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DEPARTMENT ONE

Presiding Judge

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Associate Justices

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B. REY SCHAUER	Los Angeles

DEPARTMENT TWO

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DISTRICT COURTS OF APPEALS

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Division 1

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Associate Justices

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A. F. BRAY	San Francisco

Division 2

Presiding Justice

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MAURICE T. DOOLING, Jr.	Hollister

Clerks

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John J. Noonan, Jr.	Deputy Clerk	San Francisco

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Associate Justices

WILLIAM C. DORAN	Los Angeles
LOUIS C. DRAPEAU	Los Angeles

Division 2

Presiding Justice

MINOR MOORE	Los Angeles

Associate Justices

MARSHALL F. McCOMB	Los Angeles
EMMET H. WILSON	Los Angeles

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[1] Died Feb. 13, 1950.

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

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ASSOCIATE JUSTICES

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PAUL VALLÉE	Los Angeles

CLERKS

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WM. E. DORAN	Deputy Clerk	Los Angeles
EUGENE B. STANLEY	Deputy Clerk	Los Angeles

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PAUL PEEK	Long Beach
B. F. VAN DYKE[2]	Sacramento

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THOMAS J. DILLON	Deputy Clerk	Sacramento

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LLOYD E. HIDDEN	Deputy Clerk	San Bernardino
ROY M. BOSTWICK	Deputy Clerk	Fresno
GEORGE J. KOBELIN	Deputy Clerk	San Diego

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[1] Retired Jan. 4, 1950.
[2] Appointed, took office Feb. 23, 1950.

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

Presiding Judge

HARTLEY SHAW - - - - - - - - - - - - - Los Angeles

Judges

EDWARD T. BISHOP - - - - - - - - - - Los Angeles
JESS E. STEPHENS - - - - - - - - - - Los Angeles

Clerk

J. J. MacGregor - - - - - - - - - - - - Los Angeles

SAN FRANCISCO COUNTY

Presiding Judge

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Judges

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HERBERT C. KAUFMAN - - - - - - - - San Francisco

Clerk

S. I. Hughes - - - - - - - - - - - - San Francisco

SAN DIEGO COUNTY

Presiding Judge

L. N. TURRENTINE - - - - - - - - - - - San Diego

Judges

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WILLIAM A. GLEN - - - - - - - - - - - San Diego

Clerk

Bruce Robinson - - - - - - - - - - - - - San Diego

SACRAMENTO COUNTY

Presiding Judge

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PETER J. SHIELDS [2] - - - - - - - - - - Sacramento

Judges

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RAYMOND T. COUGHLIN [1] - - - - - - - - Sacramento
GROVER W. BEDEAU [3] - - - - - - - - - Sacramento

ALAMEDA COUNTY

Presiding Judge

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Judges

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A. J. WOOLSEY - - - - - - - - - - - - - Oakland

Attorney General

Fred N. Howser - - - - - - - - - - - - Los Angeles

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[1] Became Presiding Judge Jan. 1, 1950.
[2] Resigned Nov. 5, 1949.
[3] Appointed, took office Jan. 1, 1950.

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SECOND SERIES

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PEOPLE v. THOMPSON.

Cr. 2149.

District Court of Appeal, Third District, California.
Nov. 9, 1949.

Rehearing Denied Nov. 18, 1949.

Hearing Denied Dec. 8, 1949.

Richard Thompson, on plea of guilty to charge of murder, was on June 10, 1948, adjudged guilty of murder of the first degree, at which time he was 13 years of age.

On February 1, 1949, the defendant made a motion to set aside the judgment and permit him to withdraw his plea of guilty and enter a plea of not guilty.

The Superior Court of Napa County, Mervin C. Lernhart, J., denied the motion, and the defendant appealed.

The District Court, Adams, P. J., held that there was no abuse of discretion and affirmed the order.

1. Criminal law 🔑997

A motion to set aside judgment and permit the defendant to withdraw his plea of guilty and enter a plea of not guilty is in the nature of an application for a writ of error coram nobis.

2. Criminal law 🔑997

The purpose of a writ of error coram nobis is to secure relief where no other remedy exists from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which through no negligence or fault of the defendant was not then known to the court.

3. Criminal law 🔑997

Where the defendant's age was known to all at the time of his sentence following a plea of guilty to the charge of murder, the fact that the defendant was then only 13 years of age was not ground for the issuance of a writ of error coram nobis.

4. Criminal law 🔑997

Doubt of the defendant's guilt is no ground for relief by way of writ of error coram nobis, particularly where the acts charged were admitted by the defendant and were undenied in the record.

5. Criminal law 🔑274

Where record showed that defendant 13-year old boy charged with murder was represented by able attorneys, and that he had been informed of his legal and constitutional rights before plea of guilty was entered, it could not be said that there was not ample time for due deliberation before the entry of such plea, particularly in view of fact that the complaint was filed in the justice's court on April 17, 1948, and that there were seven appearances in various courts before the plea was entered on May 21, 1948, and that thereafter there were several appearances during which no question was raised as to the matters relied upon in support of a motion for permission to withdraw the plea of guilty and to file a plea of not guilty.

6. Criminal law 🔑274

On motion for leave to permit withdrawal of plea of guilty and the entry of a plea of not guilty by defendant who was convicted of first degree murder when he was 13 years of age, denial of motion was not an abuse of discretion under the evidence.

7. Criminal law 🔑274

On motion of defendant, who was convicted of first degree murder on a plea of guilty when he was 13 years of age, for leave to withdraw plea of guilty and to enter plea of not guilty, evidence justified trial court's conclusion that at the time of the commission of the crime charged defendant knew its wrongfulness and that at time he entered his plea of guilty he knew its import. Pen.Code, § 26.

8. Criminal law ⚷1147

It is only in rare instances that an appellate court will reverse a decision of the trial court on the ground of abuse of discretion, and it cannot be said that discretion has been abused when there is a conflict in the evidence or when there is any evidence that supports the judgment of the trial court.

9. Criminal law ⚷997

The failure to arraign a defendant or the improper taking or entry of plea of guilty, or the failure of the court to comply with the juvenile court law are matters not reviewable in proceeding for the issuance of a writ of error coram nobis.

◆

George T. Davis and Kenyon C. Keller, San Francisco, for appellant.

Fred N. Howser, Attorney General, and C. J. Scott, Deputy Attorney General, Courts Bldg., for respondent.

ADAMS, Presiding Justice.

On June 10, 1948, Richard Thompson, a boy then 13 years of age, after having pleaded guilty to the charge of murder, was adjudged guilty of murder of the first degree. He was then, and had been since his arrest in April, represented by counsel of his own or his parents' choosing. No appeal was taken from the judgment, nor was any motion made to set it aside and permit the defendant to enter a plea of not guilty until February 1, 1949, when this proceeding was commenced in the Superior Court of Napa County by new counsel presumably hired by the boy's parents.

[1] The motion, to set aside the judgment and permit the defendant to withdraw his plea of guilty and enter a plea of not guilty, was heard by the trial court and denied. This appeal followed. Such a motion is of the nature of an application for a writ of error coram nobis. See People v. Mooney, 178 Cal. 525, 528, 174 P. 325; In re Paiva, 31 Cal.2d 503, 504, 190 P.2d 604; People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Gilbert, 25 Cal.2d 422, 439, 154 P.2d 657; In re Lindley, 29 Cal.2d 709, 726, 177 P.2d 918; People v. Martinez, 88 Cal.App.2d 767, 772, 199 P.2d 375 (hearing in Supreme Court denied); People v. Shorts, 32 Cal.2d 502, 516, 197 P.2d 330.

[2] Under the foregoing decisions a writ of error coram nobis is a remedy of narrow scope. Its purpose is "to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court." The applicant for such writ must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. Otherwise he has stated no ground for relief. People v. Adamson, supra, 34 Cal.2d 320, 210 P.2d 13, 15. On such a motion the court is not bound to accept at face value the allegations of the petition. See People v. Adamson, supra, 34 Cal.2d 320, 210 P.2d 13, quoting from Taylor v. Alabama, 335 U.S. 252, 262, 68 S.Ct. 1415, 92 L.Ed. 1935.

In People v. Shorts, supra, 32 Cal.2d at pages 508–510, 197 P.2d at page 336 as in other cases above cited, it was said that one seeking relief by way of writ of error coram nobis must show that he has been prompt and diligent in seeking such relief, and "that the controlling fact upon which he relies in that proceeding was not known to him at the time he was tried and convicted", and "could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."

In People v. Tuthill, supra, 32 Cal.2d at pages 821-822, 198 P.2d at page 506 the court quoted from People v. Reid, 195 Cal. 249, 255, 232 P. 457, 36 A.L.R. 1435, as follows: "'The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.'"

In in Re Lindley, supra, the narrow scope of review on writ of error coram nobis is asserted. Its availability to reverse a judgment obtained by fraud, coercion or duress, or where a plea of guilty was procured by force, violence, or intimidation, or where at the time of the trial the defendant was insane, when such facts were unknown to the court when the judgment was entered, or where the accused was prevented by fraud, force or fear from presenting defensive facts which could have been used at the trial, when such facts were not known to the court when the judgment was entered, is stated; but it is also said that it is not broad enough to reach every case in which there has been an erroneous or unjust judgment; that matters reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ coram nobis. It also said that within this rule must fall the defense of insanity as well as other defenses existing at the time of the commission of the crime. The court then noted that the plea of not guilty by reason of insanity was not raised at Lindley's trial, and added that if he was insane at the time of the hearing on the writ the procedure specified by section 3700 et seq., of the Penal Code should be followed.

People v. Martinez, supra, was a proceeding similar to the one before us, as Martinez sought the vacation of a judgment, and the withdrawal of his plea of guilty, on the grounds, among others, that he did not understand the import of his plea and thought he was pleading guilty to second degree murder, and that the evidence was insufficient to show first degree murder. The court denied the writ and was affirmed on appeal, the appellate court stating that the record showed defendant to have been represented by counsel of his own choice, and that when the trial court fixed the degree of the crime defendant was asked whether he had any legal cause to show why judgment should not be pronounced, and stated he had none. The court said, 88 Cal.App.2d at page 771, 199 P.2d at page 378: "The writ of error coram nobis never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. [Cases cited.]" It was then held that the matters relied upon by petitioner were not sufficient to justify issuance of the writ, and the court said that such a motion should be applied for at or near the time of moving for a new trial.

Appellant's grounds for reversal in the instant case are that he should be granted relief because of his age; because there is a serious doubt of his guilt and doubt as to his sanity when the plea was entered; that the plea was entered through inadvertence, ignorance and mistake, without due deliberation and against his volition, and that the judgment was void because he was never arraigned, the plea of guilty was not properly taken or entered, he was not arraigned for judgment, and that the Superior Court lacked jurisdiction because of a failure to comply with the Juvenile Court Law, thus depriving him of his liberty without due process, in violation of the Fourteenth Amendment and art. 1, sec. 13, of the California Constitution.

[3-5] Appellant's age was known to all at the time of his sentence. Therefore it presents no fact which would have prevented the trial court from rendering judgment. Doubt of appellant's guilt, if such there be, presents no ground for relief by way of writ of error coram nobis; and there was nothing before the trial court to raise a

reasonable doubt of his guilt, since the acts charged were admitted by him and are undenied in the record. As for his contention that the plea was entered through inadvertence, ignorance and mistake, without due deliberation and against appellant's volition, the record shows that appellant was at all times represented by able attorneys of whom the trial court said that they had practiced law for many years and were "known to the Court to be skilled lawyers in criminal proceedings." The record also shows that appellant had been informed of his legal and constitutional rights by such counsel and by his parents also, before his plea was entered. It cannot be said that there was not ample time for due deliberation on the part of appellant and his parents and counsel before the plea was entered, for the record shows that the complaint was filed in the Justice's Court on April 17, 1948, and thereafter there were seven appearances in the various courts before the plea was entered on May 21, 1948; and that thereafter there were several appearances during which no question was raised as to the matters herein relied upon as justifying a withdrawal of the plea of guilty.

At the hearing on this proceeding the boy testified that when he entered the plea of guilty he had not talked to his attorneys about how he should plead; that he did not know what a plea of guilty meant. However, the court said to him: "Well, supposing you hit me in the nose and I said to you: 'Are you guilty of hitting me in the nose?'—Would you know what I meant?", and the boy answered "Yes." The court then said: "If you were guilty, it would mean that you did do it, wouldn't it?", and the answer was, "I guess so." The appellant also admitted, on cross-examination, that he did confer with his parents about whether he should plead guilty or not guilty before he did so; that he had discussed it with them "Quite a few times," but that he did not remember whether he had discussed with them that he had committed the act charged in the case.

Before sentence, and for the purpose of determining the degree of the crime, evidence was taken by the court during which testimony of admissions made by the defendant was introduced. It is not contended that these admissions were made under duress, threats, or promises, or that they were not voluntarily made. They show that on April 16, 1948, defendant gave the victim of the crime, a girl about six years of age, a ride home from school on his bicycle. When they arrived at a bridge over Napa Creek they went down under it, and defendant asked the child to take off her clothes, which she did. He then inserted his finger into her vagina and into her rectum, then ordered her to put on her clothes, which she refused to do. He stated that this made him mad, that he feared she would tell her mother, which she said she would do, so he decided to kill her. He choked her with his hands and put her head under water until she quit kicking, whereupon he shoved her body into the water and it floated away. He at first denied that he had done more than molest the child as above stated; but in a later statement said that after he had kept her in the water until she stopped kicking he "took her up on the bank and played with her some more," for about five minutes; and that then "I stuck my private into hers"; that he held her up in a kneeling position with her arms over his back to do this, and inserted his penis into her about an inch. He then took her body down to the creek and dropped it into the water where it floated down, hid her clothes and went to his home.

His counsel now urges that because of his youth the appellant did not know what he was doing was wrong, or that it was wrong to kill the child. But there is ample evidence to justify the conclusion of the trial court to the contrary. The boy's own statement that he decided to kill the girl because she said she would tell her mother showed consciousness of wrongdoing; and he admitted that he had been "kicked out" of one school the year before "for playing with girls," and looking at their privates; that the principal of the school threw him out when she heard of it, and that his parents gave him a spanking. And in contradiction of his contention that he did not know it was wrong to kill the girl, Mr. Becker, the principal of the Lutheran School, in which

Richard was a sixth grade pupil, testified that he taught the boy, and saw him every day, and that he was "convinced that Richard knew the difference between right and wrong. We teach the Ten Commandments, the moral law and we definitely taught him the Commandment 'Thou shalt not kill.' He knew that killing was wrong. I am sure of it."

As for the present contention that there was doubt of the appellant's sanity, we find no grounds for such conclusion. He produced no witness to testify to that effect, but did put into evidence a report dated October 23, 1948, signed by Dr. George Tarjan, Clinical Director at the Pacific Colony State Hospital at Spadra, to which hospital the boy had been referred by the Youth Authority for observation after the court had committed him to such Authority. That report is too long for repetition here, but the portion of it upon which appellant relies reads: "It was the opinion of the staff that, on the basis of the past history of examination and investigation, the ordinary methods of rehabilitation would not be sufficient for this boy. It was felt that he is in need of psychiatric care because his release to society without psychiatric care might carry the danger of repetition of similar acts. The staff felt that the diagnosis in this case should be psychopathic personality, mixed type (defective or psychopathic delinquency), normal mentality, M. A. 13, I. Q. 97. On that basis the staff recommended that the boy is a suitable subject for commitment to the appropriate institution of the Department of Mental Hygiene (Sonoma State Home) for care and treatment under the defective or psychopathic delinquency section of the Welfare and Institutions Code."

That conclusion, if accepted at full face value, is far from a finding of insanity or even of sub-normal mentality; and the report contains nothing showing that the boy was not guilty of the crime or that he was not aware of the wrongfulness of his acts. It does show a belief on his part "that he could do anything as long as the parents' protection is [was] with him."

[6] Certainly the evidence before the trial court on the hearing of this petition shows nothing to justify appellant's contention that the denial of the motion to set aside the judgment and permit him to enter a plea of not guilty constituted an abuse of discretion.

[7] Appellant's present attorneys were given full opportunity to present medical testimony as to the defendant's sanity, but failed to do so. Admittedly, what shall be done with a boy of defendant's age who commits first degree murder under circumstances such as appear in this case presents a difficult problem, but not one for determination in this proceeding. That the degree of the crime was properly fixed at first degree murder was amply proven, not only by the boy's admissions but by the report of the physician who performed the autopsy upon the body of the victim, which shows that the homicide was committed in the perpetration or attempted perpetration of rape, Pen.Code, sec. 189; and while the boy was under the age of fourteen years, the evidence justifies the conclusion of the trial court that at the time of the commission of the crime charged, defendant knew its wrongfulness, Pen.Code, sec. 26, and that at the time he entered his plea he knew its import.

[8] It is only in rare instances that an appellate court will reverse a decision of a trial court on the ground of abuse of discretion; and it cannot be said that discretion has been abused where there is a conflict in the evidence or there is any evidence which supports the judgment of such court. See Yost v. Johnson, 91 Cal.App.2d 849, 206 P.2d 13, and cases therein reviewed.

[9] As for the argument that the judgment is void because defendant was never arraigned, that the plea was not properly taken or entered, and that the court failed to comply with the Juvenile Court Law, we have examined the record and conclude not only that these contentions are without sufficient foundation, but that they are matters not reviewable in a proceeding for the issuance of a writ of error coram nobis. People v. Adamson, supra, 34 Cal.2d 320, 210 P.2d 13.

The order is affirmed.

PEEK and THOMPSON, JJ., concur.

VALDEZ v. HANKINS.

Civ. 16961.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1949.

Rehearing Denied Dec. 13, 1949.

Hearing Granted Jan. 12, 1950.*

Action by Josephine Valdez against Franklin D. Hankins for alleged malpractice.

The Superior Court of Los Angeles County, Henry M. Willis, J., entered a judgment for plaintiff for $7,500, and the defendant appealed.

The Court, Doran, J., held that the judgment was not supported by the evidence, and reversed it.

1. Physicians and surgeons ⚷15(15)

Mere proof that owing to mistaken report of cancer by hospital laboratory the surgeon in charge assisted by defendant, whose duty was to follow the directions of his chief, removed the patient's breast after removal of enlarged gland in the patient's axilla for microscopic examination, was insufficient to render such assistant liable to patient.

2. Physicians and surgeons ⚷14(1)

A surgeon may not be held liable for malpractice unless there is proof of some wrongful or negligent act on his part.

3. Physicians and surgeons ⚷16

Any negligent haste in removal of patient's breast by surgeon in charge, assisted by defendant, whose duty it was to obey the directions of his chief, after a negligent and mistaken diagnosis of carcinoma by hospital laboratory, could not be imputed to assistant.

4. Physicians and surgeons ⚷16

Any negligent and mistaken diagnosis of carcinoma by hospital laboratory, which resulted in the removal of patient's breast could not be imputed to assistant of surgeon in charge.

◆

Gibson, Dunn & Crutcher, Los Angeles, Philip C. Sterry, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by the defendant Hankins, a physician and surgeon, from a judgment rendered against such defendant in a malpractice action. The action was originally brought against Drs. Percy (now deceased), Hankins, Kimball, Evans and Levi. At the first trial judgments of nonsuit were rendered in favor of Kimball, Evans and Levi, and a judgment on a directed verdict was entered in favor of defendants Percy and Hankins. On appeal, Valdez v. Percy, 35 Cal.App.2d 485, 96 P.2d 142, the judgments of nonsuit were affirmed and the judgment on directed verdict was reversed. At the second trial, the judge, presiding without a jury, found for the plaintiff as against the defendant Hankins.

Plaintiff's first cause of action alleges that the defendant Percy, a specialist in cancer surgery, was employed in reference to an enlarged lymph gland in plaintiff's right axilla; that Dr. Percy advised a removal of such gland for the purpose of examination, and that the same was removed; that thereafter Percy and "his servants, agents and employees" unlawfully and without plaintiff's consent, did "operate upon another and different part of the body of plaintiff and removed the right breast", etc. The second cause of action alleges that defendants "negligently and carelessly and erroneously diagnose(d) the said enlarged lymph gland * * * as Carcinoma" of the right breast, and "illegally, unlawfully and without the permission and consent of the plaintiff", removed the right breast.

A third cause of action alleges that while plaintiff was unconscious, "the said defendant did carelessly, negligently and unlawfully and without right remove the right breast of plaintiff", etc. The answer of the appellant, Dr. Hankins, denies the allegations of the complaint except for admitting "that an operation was performed upon plaintiff for the removal of a gland from the area of the right axilla, and * * * that the nurses, internes and employees of the General Hospital participated in the said operation".

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* Subsequent opinion 217 P.2d 422.

At the second trial, the previous testimony of Dr. Percy, cancer specialist and plaintiff's physician who had died subsequent to the first trail, was read in evidence where relevant to the issues of the second trial, at which second trial Dr. Hankins, the appellant, was the sole defendant. From this and other testimony it appears that Dr. Hankins was a resident physician at the County General Hospital, admitted to practice two years prior to plaintiff's operation, and assigned to the surgical service of which Dr. Percy was chief. It was appellant's duty to assist Dr. Percy as directed. Except as acting in the capacity of assistant to Dr. Percy, appellant had no connection with plaintiff's case or operations.

Plaintiff's case, as was usual in such matters, was referred to the hospital Malignancy Board composed of eight or nine doctors. The Malignancy Board recommended, as Dr. Percy had previously advised plaintiff, that the enlarged gland in plaintiff's axilla should be removed and examined microscopically to determine if it was malignant. Pursuant to such recommendation, plaintiff entered the hospital and signed the usual written consent authorizing the performance of such operations as might be "deemed advisable or necessary".

On March 1, 1934, Dr. Percy, assisted by appellant, excised the gland in question and it was sent to the hospital laboratory for examination. Shortly thereafter and while plaintiff was still under anesthesia, the head nurse announced that the laboratory report was "Carcinoma", or according to some testimony, "Carcinoma of the breast". Plaintiff's right breast was then removed under the direction of Dr. Percy; the latter and Dr. Hankins, assistant, participating in the operation. "When we got through with the operation", Dr. Percy testified, "after, practically, the wound was sewed up, the patient was ready to go back to her room, and then a report came in from Miss Rydalch (head nurse) that the technician in the laboratory had come down specially so say that she had made a mistake". Dr. Percy further stated that the operation for removal of plaintiff's breast was commenced "right away" after receiving the mistaken carcinoma report for the reason that "The woman was under an anesthetic, and I was under moral obligation not to keep her under the anesthetic any longer than was possible or necessary".

Dr. Hankins testified that "Dr. Percy and myself" performed the breast amputation; that Dr. Percy "directed me to do the operation and that he did a great deal of assisting; but there were certain times during the operation that he did take the cautery and did certain difficult parts of the operation". Appellant also stated that "Dr. Percy discussed that report (carcinoma) with me and also gave that report to Dr. Valdez (plaintiff's husband) who was in the operating amphitheatre"; that "After he had completed his discussion with Dr. Valdez, Dr. Percy directed me to proceed with the amputation of Mrs. Valdez' breast". After the operation was complete except for placing a few more stitches in the skin, the head nurse brought in a written report to the effect that "the diagnosis has been changed by the laboratory", and that "they now think that this is a Hodgkin's disease, or a possible lymphona".

The supervising nurse who was present at the operation, testified that after the report of "carcinoma" was received, Dr. Percy said to Dr. Valdez, plaintiff's husband, "Well, that is the report of the laboratory. Shall we go ahead?" and that Dr. Valdez "agreed with Dr. Percy", and "said to go ahead". The nurse further testified that when the later report was received changing the diagnosis, the operation "was almost finished"; that more than 20 minutes intervened between the two reports.

It was the testimony of Dr. Valdez, plaintiff's husband, that after the carcinoma report was received, Dr. Percy "told me to go out", that Dr. Valdez remained out of the room from five to ten minutes, and upon returning "the havoc had already been accomplished" and the operation for removal of the breast was under way. Further, that "why we went to Dr. Percy was just to excise that lymph node and find out what it was", and that there was no authority for proceeding with the radical operation for removal of the breast.

In answer to a hypothetical question, plaintiff's expert, Dr. Webb, expressed an opinion "that the operation was premature; that sufficient or accurate diagnosis had not been made". Dr. Schmoele, called by the defendant, stated that under the circumstances of the case, "I would feel it necessary to operate * * * because carcinoma of the axillary glands in practically all cases are metastatic from a primary carcinoma of the breast". A similar opinion was expressed by defendant's witness, Dr. Kroger.

The trial court found as to the first cause of action that the defendant Hankins personally removed plaintiff's right breast, but that it was not true that "he operated upon a different portion of plaintiff's body from that portion embracing the enlarged gland" without plaintiff's permission or consent. As to the second cause of action it was found that Hankins negligently diagnosed the condition as carcinoma of the breast "and did then and there fail to discover by the exercise of ordinary care that said breast was not affected with carcinoma, or any other disease". In respect to the third cause of action the trial court found that Dr. Hankins "did carelessly, negligently and wrongly remove the right breast of plaintiff", and fixed the plaintiff's damage at $7,500.00.

It is appellant's contention that "The evidence is wholly insufficient to sustain the finding that the defendant Dr. Hankins was negligent". Appellant's brief states: "It conclusively appears that Dr. Percy was in charge of the case and that Dr. Hankins * * * had been assigned * * * to assist during the operation under the direction and control of Dr. Percy and that it was his duty to follow the directions given him by Dr. Percy during the course of the operation".

In this connection it is further argued that "Dr. Webb (plaintiff's expert) did not express an opinion as to any negligence upon the part of Dr. Hankins. The hypothetical questions * * * were confined and limited to Dr. Percy", referred to in the question as "a physician and surgeon * * * holding himself out as a specialist in the treatment of cancer and malignant growths". The question also asked the expert to "Assume that *the* physician found the breasts normal, of equal size", and "that *the surgeon in charge* continued with the operation and removed the breast". (Appellant's italics.) Appellant's brief further avers that in any event, Dr. Webb's opinion that such care and skill had not been exercised was based solely upon the incorrect pathological diagnosis for which * * * Dr. Hankins was in no wise responsible".

Apropos the above contentions "It is interesting to note", states appellant's brief, "that the trial court in its Memorandum for Decision stated that the mistake in diagnosis was not discovered until too late to prevent and avoid the operation (Clk.Tr. p. 33, lines 1 to 14)". The trial court also stated "That announcement (carcinoma) immediately resulted in the breast being removed within the next ten or fifteen minutes, or thirty minutes, whatever it took; and as the witness says, the havoc was done before the second report got there, that 'There is a mistake here; this isn't breast; this is axilla' ".

[1] The judgment herein, holding the defendant Hankins liable for negligence in the diagnosis of plaintiff's ailment and the negligent and wrongful removal of the breast, must be reversed because of a total lack of evidence as to negligence on the part of Dr. Hankins. The most that the record indicates is that, owing to a mistaken report emanating from the hospital laboratory and relied upon by Dr. Percy who was in charge of plaintiff's case, Dr. Percy, now deceased, assisted by Dr. Hankins who acted entirely under the direction of Dr. Percy, removed plaintiff's breast during the period of time elapsing between the erroneous "carcinoma" report and the later corrected report showing that such condition did not exist. This is far short of the required substantial evidence necessary to support a judgment against the appellant, Dr. Hankins.

[2] It requires no argument and no citation of authorities to sustain the proposition that appellant cannot be held liable for malpractice in reference to plaintiff's operation unless there is proof of some wrongful or negligent act on appellant's part. That a most lamentable error occurred resulting in serious injury to the plaintiff cannot be denied. Such fact, however, affords no excuse for penalizing the appellant in the absence of evidence of fault.

[3] If, as affirmed in the trial court's Memorandum for Decision, the basis for the judgment is the removal of plaintiff's breast "with negligent haste after a negligent and mistaken diagnosis that it was afflicted with carcinoma", it must be remembered that the appellant, Dr. Hankins, was not the surgeon in charge of the operation, but a mere assistant. The record discloses no evidence that Dr. Hankins made any decision as to how soon the operation should be performed, and it is a reasonable conclusion that this matter, as indeed all matters connected with the operation, were decided by the surgeon in charge, Dr. Percy. Hence, assuming but not deciding that there was "negligent haste", such fault cannot be charged to the appellant.

[4] In like manner any "negligent and mistaken diagnosis", the causa causans of plaintiff's injury, was a matter with which Dr. Hankins had no connection whatsoever. The mistake in question emanated from the pathological laboratory of the hospital, and at a previous trial of the case, Dr. Kimball, the pathologist, then a defendant, was absolved from liability; the judgment was affirmed by this court in Valdez v. Percy, 35 Cal.App.2d 485, 96 P.2d 142. As before indicated, Dr. Percy died before the second trial took place.

In view of the holding that the judgment against appellant is not supported by the evidence, it is unnecessary to discuss appellant's other contentions.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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94 Cal.App.2d 566

GILLESPIE v. HAGAN et al.

Civ. 17191.

District Court of Appeal, Second District,
Division 2, California.
Nov. 9, 1949.

Nell Gillespie sued Evert L. Hagan and J. A. Hagan to recover a commission allegedly due for broker's services rendered in connection with the sale of realty and personalty.

The Superior Court of Los Angeles County, William B. McKesson, J., rendered a summary judgment for plaintiff and ordered defendant's motion to vacate the judgment denied, and defendants appealed.

The District Court of Appeal, Wilson, J., reversed the order and judgment with directions, and held that a triable issue of fact was presented.

1. Judgment 🔑181(2, 6)

Upon plaintiff's motion for summary judgment, issue to be determined was whether defendants presented any facts which gave rise to a triable issue or defense. Code Civ.Proc. § 437c.

2. Judgment 🔑185

Affidavits filed on behalf of defendants in opposition to motion for summary judgment were to be liberally construed to end that defendants would not be summarily deprived of a full hearing at trial. Code Civ.Proc. § 437c.

3. Judgment 🔑185

Facts set out in affidavits filed in opposition to motion for summary judgment must be accepted as true; and if an issue of fact is raised, summary judgment is improper. Code Civ.Proc. § 437c.

4. Brokers 🔑40

Vendors' modified agreement to sell realty on terms to which they had not previously obligated themselves was sufficient consideration for broker's agreement, if any, to waive right to commissions until close of escrow. Civ.Code, § 1698.

5. Brokers 🔑60

When a contract provides that a broker's commission is to be paid only upon completion of an escrow transaction, commission does not become due where through no fault of seller transaction is never completed.

6. Judgment ⚿185

Where broker sued two individuals for commissions under written agreement signed by one only, and affidavits in support of and against broker's motion for summary judgment failed to show that one individual was present at time action was taken by the other on his behalf or that he had knowledge of facts in connection with the transaction, broker was not entitled to summary judgment against absent individual on ground such individual failed to make affidavit in opposition to motion. Code Civ.Proc. § 437c.

7. Judgment ⚿185

Where broker presented affidavit in support of motion for summary judgment on complaint alleging breach of written agreement for commissions for sale of realty and business, and opposing affidavits showed that at meeting with prospective purchasers, broker agreed she would not receive commission until close of an escrow, that escrow was never closed, and that modification of agreement also made commission, if any, payable to broker jointly with another, a triable issue of fact was presented, and broker was not entitled to a summary judgment. Code Civ.Proc. § 437c; Civ.Code, § 1698.

Jesse A. Hamilton, Los Angeles, for appellants.

Max Vernon Pollack, Los Angeles, for respondent.

WILSON, Justice.

Appeal by defendants from a summary judgment rendered pursuant to section 437c[1] of the Code of Civil Procedure and from an order denying their motion to vacate the same. The sole question to be determined is whether the pleadings and affidavits "present a triable issue of fact."

Plaintiff, a licensed real estate and business opportunity broker, brought this action to recover a commission alleged to be due and owing to her for services rendered in the sale of real and personal property. The complaint alleges that defendants were the owners of certain real property and were the owners and operators of a cheese and food processing business operated thereon by defendants Hagan as copartners under the name of El Rey Cheese Company; that defendants employed plaintiff by an instrument in writing which is set forth in the complaint to secure a purchaser for the real property and the food processing business; that she procured purchasers who entered into a written contract for the purchase of the property and that defendants have not paid any part of

[1] Section 437c, insofar as necessary for the determination of this appeal, reads:

"In superior courts and justices' courts of Class A and municipal courts when an answer is filed in an action to recover upon a debt or upon a liquidated demand * * * if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party, * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases.

"The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

"The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto * * *" the commission. The agreement is signed by Evert L. Hagan only.

Defendants Evert L. Hagan and J. A. Hagan filed individual, separate answers in which each denied they were the owners of the real property or of the food processing business operated thereon but alleged Evert L. Hagan was the owner of the real property and J. A. Hagan was the owner of the food processing business. Each denied they were copartners doing business as El Rey Cheese Company or were partners at all in the operation of the business. J. A. Hagan denied he employed plaintiff as a real estate or business opportunity broker by an instrument in writing or at all to secure a purchaser for the real property or the business above referred to, or that he agreed in writing or at all to pay plaintiff for any services rendered by her in the sale of the real property or the business.

Evert L. Hagan, by his third amended answer, admits that he signed the written listing agreement set forth in plaintiff's complaint and alleges that plaintiff procured Herschel O. Condon and Lydia E. Condon as prospective purchasers for the property and the business for $100,000 cash and "without any escrow"; that thereafter the Condons, upon consultation with their attorney, insisted that the sale go through a formal escrow but defendant refused to go into escrow; that thereafter the Condons, at a meeting held in the office of their attorney, produced a written agreement for the purchase and sale of the real property and business, to which was attached an agreement to be signed by defendant for the payment of commission to plaintiff and John Bessler; that there were present at the meeting, beside the Condons and their attorney, plaintiff Gillespie, defendant Evert L. Hagan and Charles Farrington; that defendant thereupon refused to enter into the escrow unless plaintiff agreed to modify her brokerage contract so that her commission was to be paid "from the escrow and at the close of the escrow"; that plaintiff then and there so orally agreed and defendant fully executed the oral agreement and signed the contract providing for an escrow; that the Condons' attorney thereupon inserted in the commission agreement the words "at close of escrow" conforming the same to defendant's demand; that defendant and the Condons then opened an escrow providing that the same should be closed within 45 days; that the escrow was never completed by reason of the refusal of the Condons to carry out any of the terms of the contract of sale or of the escrow.

Plaintiff presented a motion for an order striking out the answer of J. A. Hagan and the third amended answer of Evert L. Hagan and for the entry of judgment according to the demand of the complaint. With her motion she filed her affidavit repeating substantially the allegations in her complaint and alleging further that when Evert L. Hagan signed the contract for the payment of commission he was authorized by written power of attorney from J. A. Hagan to sell the food processing business and real property; that she and defendants at no time discussed a sale of the business and real property without an escrow; that when the contract of sale was signed by defendants and the Condons plaintiff stated that she wished to be protected in escrow, and that there was no discussion between plaintiff and defendants relative to any modification of the original agreement; that defendants have kept the escrow with the Condons open for the purpose of showing that the latter were unwilling to perform their agreement although defendants have sold the real property and business to another person.

In opposition to the motion for a summary judgment there was filed an affidavit by Evert L. Hagan in which he recites substantially the allegations made in his third amended answer, and further states that when he refused to make the sale to the Condons through escrow the latter agreed to bear the expenses of an escrow, and plaintiff agreed that if defendants would sell through a formal escrow she, plaintiff, was not to receive any brokerage fees until the close of the escrow; that in consideration of plaintiff's offer there was an oral agreement modifying the original contract between affiant and plaintiff and that the oral modification agreement was fully executed by defendant by his entering into a written contract of sale upon the altered terms and entering into the escrow; that shortly after the escrow was opened plaintiff procured from the escrow holder a sheet headed "Escrow Instructions," lines blank for signature, in which the escrow holder was directed to "pay as commission at the close of escrow" the sum of $2500 to John Joseph Bessler and $2500 to Nell Gillespie; that affiant signed the paper and delivered it to plaintiff to be returned to the escrow holder. Affiant further states that he believes and has been informed by his attorneys that he has a meritorious defense to the action; that the original contract for brokerage commission was altered both orally and in writing, that such modifications have been fully executed and that the modified contract is the only one upon which plaintiff can collect a commission from affiant.

An affidavit of Charles M. Farrington, who was present at the meeting held in the office of the attorney for the Condons, corroborates the statements contained in the affidavit of Evert L. Hagan as to the conversations that occurred at that meeting and as to the alteration of the typed agreement by the Condons' attorney so as to show that the commission was to be paid at the close of escrow. He also corroborates Hagan's affidavit to the effect that originally it was agreed that there should be no formal escrow but that the agreement was altered at the attorney's office, as stated in Hagan's affidavit, with the same terms and conditions as stated by Hagan. Affiant further states that plaintiff agreed to the alteration of the commission agreement so that she would receive her commission at the close of escrow, and that after the escrow was opened she had instructions prepared that she and John Bessler were to receive their commission at the close of escrow and delivered the same to the escrow holder.

Upon the foregoing affidavits and pleadings the court rendered judgment against defendants Evert L. Hagan, J. A. Hagan and El Rey Cheese Company for the amount sued for by plaintiff.

Thereafter defendants moved to vacate and set aside the order striking their respective answers from the files and vacating the summary judgment. The motion was denied, whereupon defendants appealed from the judgment and from the order denying their motion to set it aside.

[1-3] The original commission agreement set out in the complaint upon which plaintiff bases her prayer for judgment provides that if a purchaser, ready, able and willing to purchase the property, should be procured by the agent during the period of the agency and upon the terms prescribed, the seller agrees to pay the agent a commission of 5 per cent on the selling price. No mention is made in the commission agreement of an escrow, and if it be assumed that plaintiff, within the period of her agency, produced a purchaser who was ready, able and willing to purchase the property on defendants' terms she would thereupon have been entitled to her commission. However, upon the motion for a summary judgment the issue to be determined was whether or not defendants had presented any facts which gave rise to a triable issue or defense. Strauss v. Strauss, 90 Cal.App.2d 757, 759, 203 P.2d 857; Eagle Oil & Refining Co., Inc., v. Prentice, 19 Cal.2d 553, 555, 122 P.2d 264, and cases cited; Gardner v. Shreve, 89 Cal.App.2d 804, 807, 202 P.2d 322. The affidavits filed on behalf of defendants must be liberally construed to the end that they will not be summarily deprived of a full hearing at a trial of the action. Eagle Oil case, 19 Cal.2d 553, page 556, 122 P.2d 264. The facts set out by defendants in their affidavits must be accepted as true and if an issue of fact is raised a summary judgment is improper. Strauss v. Strauss, supra; Bank of America Nat. Trust & Savings Ass'n v. Casady, 15 Cal.App.2d 163, 168, 59 P.2d 444.

The facts presented in the affidavit of Evert L. Hagan were that when plaintiff brought the Condons to him it was agreed that the sale was to be for cash and with no escrow; that at the meeting in the attorney's office the Condons insisted on an escrow and Hagan refused to accede to their demand; that the Condons agreed to pay the expenses of the escrow, and plaintiff agreed that she was not to receive her commission until the close of the escrow; that the attorney modified the contract so to provide, and after the escrow was opened plaintiff brought to Hagan an order directed to the escrow holder to pay the commission "at the close of escrow." The affidavit further showed that the escrow was never closed.

[4, 5] A contract in writing may be altered by an executed oral agreement. Civil Code, sec. 1698. Defendants' agreement to sell the property on terms to which they had not obligated themselves, to wit, to sell through escrow, was a sufficient consideration for plaintiff's agreement to waive her right to commissions until the close of the escrow. Rice Lands & Products Co. v. Blevins, 61 Cal.App. 536, 543, 215 P. 402. When a contract provides that a commission is to be paid only upon completion of the escrow transaction the commission does not become due where, through no fault of the seller, the transaction is never completed. Smith v. Frans Nelson & Sons, Inc., 214 Cal. 295, 296, 5 P.2d 427. Where the only written memorandum to pay a commission was contained in escrow instructions which authorized the escrow holder to pay the commission "at close of escrow," and the escrow instructions were cancelled shortly after being executed because the prospective purchaser refused to proceed with the sale, it was held that the agent was not entitled to his commission. Parsons & Nelson, Inc. v. Von Der Lohe, 120 Cal.App. 277, 278, 7 P.2d 697.

Accepting the statements in the affidavits filed by defendants to be true, as we must, Strauss v. Strauss, supra; Bank of America Nat. Trust & Savings Ass'n v. Casady, supra, the original agreement to pay plaintiff a commission when she had produced a purchaser ready, able and willing to purchase on Hagan's terms was modified so as to provide for payment at the close of escrow, the consideration for which modification was Hagan's agreement to sell on terms different from those to which he had previously given his assent.

[6] Plaintiff maintains that the judgment against J. A. Hagan should stand for the reason that he did not make an affidavit in opposition to the motion for summary judgment. He did not sign the original agreement. It was signed by Evert L. Hagan only and it does not purport to have been made on behalf of J. A. Hagan. There is no statement in any of the affidavits that he was present at the meeting in the office of the Condons' attorney. The agreement was signed at that meeting by Evert L. Hagan as the attorney in fact for J. A. Hagan; the agreement to pay the commission "at close of escrow" was similarly signed. Since section 437c of the Code of Civil Procedure requires the facts stated in an affidavit in opposition to a motion for summary judgment to be "within the personal knowledge of the affiant" and since it does not appear that J. A. Hagan had any knowledge of the facts in connection with the transaction, he could not have made an affidavit that would comply with that section.

[7] It is manifest that there is a triable issue of fact as to whether a consideration was payable to plaintiff at all and if so whether payable when the purchasers were produced or at the close of escrow. There may be others, one for example being whether, if a commission is owing at all, it is due to plaintiff alone under the original agreement or to her and John Bessler by reason of the written modification and the form of order upon the escrow holder which plaintiff presented to Evert L. Hagan after the escrow had been opened which provides for the payment of $2500 each to plaintiff and John Bessler. Since plaintiff may desire to amend her complaint and defendants may deem it proper to amend their answers an appropriate order will be made in that respect.

The judgment and the order appealed from are reversed with directions to the trial court to vacate the order striking the answer of J. A. Hagan and the third amended answer of Evert L. Hagan from the files, to reinstate those pleadings in the record and to grant the parties leave to amend their respective pleadings upon application therefor.

MOORE, P. J., and McCOMB, J., concur.

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94 Cal.App.2d 546

TOMPKINS v. BISHOP et al.

Civ. 14011.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1949.

Action to quiet title to realty by Colonel E. Tompkins against Ernest L. Bishop, and others.

The Superior Court of Santa Cruz, James L. Atteridge, J., entered a decree awarding an undivided one-half interest in the property to defendants Ralph C. and Pearl Humphrey and the other one-half to plaintiff, and plaintiff appealed.

The District Court of Appeal, Goodell, J., held that under prior agreement between plaintiff and his wife, since deceased, title to realty conveyed to them vested in them as tenants in common and not as community property and affirmed the decree.

1. Husband and wife 🔑266

Written agreement executed by husband and wife on day of marriage but after ceremony, whereby husband agreed to leave to wife's separate ownership and possession all property she then had or might thereafter acquire was not an antenuptial agreement but was valid under statute giving husband and wife plenary authority to contract with each other respecting property. Civ.Code, §§ 158, 159.

2. Husband and wife 🔑266

Under plenary authority to contract conferred by statute, spouses may, by contract made during marriage change the character of property from community to separate estate of both or either spouse. Civ.Code, §§ 158, 159.

3. Husband and wife 🔑14(4), 266

Under agreement between husband and wife executed during marriage whereby husband agreed to leave to wife's separate ownership and possession all property she then had or might thereafter acquire, title to realty thereafter conveyed to husband and wife, though it was presumptively community property, vested in husband and wife as tenants in common and not as community property. Civ.Code, §§ 158, 159, 161, 164, 172a.

4. Appeal and error 🔑1008(1)

Trial court's finding that, as between husband and wife, statutory presumption that property, acquired by them as such, was community property was dispelled by prior agreement between husband and wife was binding on appeal. Civ.Code, §§ 158, 159, 161, 164.

5. Husband and wife 🔑14(4)

Title to improvements, added at husband's expense to land owned by husband and wife as tenants in common, followed the title to the land. Civ.Code, § 161.

6. Husband and wife 🔑266

That agreement between husband and wife whereby husband agreed to leave to wife's separate ownership and possession all property she then had or might thereafter acquire was not recorded until after wife's death was immaterial as between husband and his wife or her grantees, no rights of creditors or other third persons being involved. Civ.Code, §§ 158, 159, 161.

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John H. Leonard, Santa Cruz, for plaintiff and appellant.

Stanford G. Smith, Loyd R. Miller, Santa Cruz, for defendants and respondents.

GOODELL, Justice.

The appellant sued to quiet title to a piece of residential property on Gault street in the city of Santa Cruz. The complaint alleged that it was the community property of appellant and Mary M. Tompkins at the time of her death and that appellant's claim thereto was based on his status as surviving spouse. Respondent Ernest L. Bishop was a son, and respondent Pearl Humphrey a daughter, of Mrs. Tompkins by her former marriage. Respondents' answer denied the allegations of the complaint and alleged that on May 5, 1947 Mary M. Tompkins deeded an undivided one-half interest in the property to Ernest L. Bishop who (joined by his wife) on June 2, 1947, deeded the one-half interest to Ralph C. Humphrey and Pearl Humphrey his wife.

The court made findings in favor of defendants and decreed that an undivided half of the property was owned by respondents Ralph C. and Pearl Humphrey and the other half by appellant. From the decree this appeal was taken.

The appellant and Mary M. Tompkins (formerly Bishop) were married on August 30, 1927, at which time Mrs. Tompkins owned upwards of $20,000 of income-producing property. On the day of their marriage the spouses entered into an agreement reading as follows: "That in consideration of the consent of said party of the second part to become the wife of said party of the first part, and her agreement to faithfully observe and perform all the duties and obligations of a wife to said first party, said first party hereby agrees to and does forever renounce, remise, release and forever quit-claim all and singular his rights, claims and interest in and to all property and property rights of the said second party; that he disclaims and relinquishes all marital rights of or to property now belonging to her, or that she may hereafter acquire, of every kind and nature; that he releases and forever quitclaims all and every right of inheritance, or right of succession in law and in equity; and agrees to leave to her separate ownership and possession all property she now has or may hereafter acquire, to go to her heirs at law or inheritance, exclusive of any rights he might otherwise have in case of her death; * * *"

The defense was founded on the agreement, a copy whereof is contained in the answer. Since no affidavit was filed under section 448, Code Civ.Proc., its genuineness and due execution were deemed admitted.

In November, 1939 appellant and his wife contracted to buy the property for $1,500 on small monthly payments. All the payments were made by appellant from his earnings and old age security allowances according to his undisputed testimony. In 1946 title was conveyed to appellant and Mary M. Tompkins by a deed which described them as husband and wife.

Shortly before Mrs. Tompkins' death a part of the property was sold for $3,000, of which appellant received approximately $600, his wife a little under $600, and approximately $1,800 was put into improvements on the remaining part.

On May 5, 1947, which was 12 days before her death, Mrs. Tompkins conveyed the undivided one-half interest to her son without her husband's knowledge.

Appellant contends that as "Section 172a of the Civil Code gives the husband 'the management and control of the community real property'" Grolemund v. Cafferata, 17 Cal.2d 679, 684, 111 P.2d 641, 643, the deed signed solely by his wife was ineffective to pass any title. He states "that the one ultimate fact to be established by appellant is that the real property to which Mrs. Tompkins executed a deed was community property and this fact is proven by the receipt in evidence of the deed to appellant and to Mrs. Tompkins as 'husband and wife'". On that issue, however, the court found against him, and the only question presented for decision is whether such finding is supported by the evidence. There can be no doubt that the court based its finding on the agreement.

"A husband and wife may hold property as joint tenants, tenants in common, or as community property." Sec. 161, Civ.Code. Since the spouses did not take title as joint tenants, they must have taken either as tenants in common or as community property.

In addition to the facts already recited as to the source of the payments, appellant relies on the provision of section 164, Civ. Code that when "property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife." It may be conceded that the facts respecting the manner in which the property was paid for, taken in combination with the presumption of section 164, were sufficient—*other things being equal*—to have given the title a community property character. However, appellant was confronted with the following provision of the agreement: "and (he) agrees to leave to her separate ownership and possession all property she now has or may hereafter acquire." There is no limitation therein as to the mode or manner of acquisition.

[1] Section 158, Civil Code provides that "Either husband or wife may enter into any engagement or transaction with the other * * * respecting property, which either might if unmarried * * *." The agreement was made on the day when the parties were married, but *after* the ceremony, for it describes them as husband and wife and is signed and acknowledged in the wife's new name. It was not, as respondents repeatedly call it, an antenuptial agreement, but was squarely within the provisions of section 158.

Appellant testified that there was an understanding between himself and his wife that the Gault street place would be community property, but the court apparently did not permit such testimony to outweigh the provisions of the written contract.

It may be assumed that when the spouses made the contract in 1927 they knew nothing of the Gault street property which they acquired 19 years later. Their contract, however, applied as well to property *thereafter acquired* as to property theretofore owned by Mrs. Tompkins.

[2] It is settled law that "under the plenary authority to contract conferred by sections 158 and 159 of the Civil Code, the spouses may by contract made during the marriage change the character of property from community to separate estate of both or either spouse * * *." 3 Cal. Jur. 10 yr. supp., p. 638; Siberell v. Siberell, 214 Cal. 767, 770, 7 P.2d 1003. In Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719, 720, 103 P. 190, 193, one of the leading cases, the court says: "Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby one may release to the other all interest, both present *and in expectancy*" citations; emphasis added). There the agreement between the husband and wife was that all community property on hand *or to be acquired by either* should be and become the sole and separate property of the wife.

[3, 4] It follows that when the property was conveyed to appellant and Mrs. Tompkins title vested in them as tenants in common and not as community property. The agreement which contemplated after-acquired property transmuted what might otherwise have been the wife's community interest into her separate property. In other words the presumption of section 164, which was but disputable In re Estate of Trelut, 26 Cal.App.2d 717, 723, 724, 80 P.2d 147 as between the spouses, was dispelled by the agreement, and the court's finding against the presumption is binding on appeal. In re Estate of Trelut, supra; In re Estate of Ades', 81 Cal.App.2d 334, 337, 184 P.2d 1.

In addition to the provision in the agreement that after-acquired property should have a separate character, it must be borne in mind that therein appellant also disclaimed and relinquished to his wife "all marital rights of or to property now belonging to her, or that she may hereafter acquire * * *" also "all and every right of inheritance, or right in law and in equity."

[5] Granting that improvements were added to the property by appellant or at his expense, the title thereto followed the title to the land. 3 Cal.Jur. 10 yr. supp. p. 525; Shaw v. Bernal, 163 Cal. 262, 267, 124 P. 1012; Dunn v. Mullan, 211 Cal. 583, 588, 589, 296 P. 604, 77 A.L.R. 1015; Walsh v. Walsh, 56 Cal.App.2d 801, 804, 133 P.2d 416.

[6] The fact that the agreement was not recorded in Santa Cruz county until

a month after Mrs. Tompkins' death is of no legal consequence as between appellant and his wife or her grantees, no rights of creditors or other third persons being involved. In re Estate of Cutting, 174 Cal. 104, 109, 161 P. 1137.

The decree is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

94 Cal.App.2d 551

PEOPLE v. ACUFF.

Cr. 2610.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1949.

Ralph G. Acuff was convicted in the Superior Court of Contra Costa County, Hugh H. Donovan, J., of forging and of uttering two checks after prior conviction of issuing a fraudulent check in Wyoming, and from such conviction, and from an order denying a new trial, he appealed.

The Court, Goodell, J., held that there were no errors prejudicial to the defendant and affirmed both the judgment and order.

1. Criminal law 🔑1128(2)

A letter received by the defendant after trial from foreman of jury could not be considered where not a part of the record, and since it was not before the trial court on motion for new trial it could not be made a part of the record.

2. Criminal law 🔑666(1)

In prosecution for forging and uttering two checks in Contra Costa County, the district attorney was under no duty to call the sheriff of Amador County, who had arrested the defendant in absence of showing that there was some connection between the arrest and the matter on trial, and judge could not with propriety compel the district attorney to call such sheriff as a witness. Pen.Code, §§ 470, 476.

3. Criminal law 🔑720½

Where district attorney's statement that he was completely satisfied that the defendant was guilty on every count was made after a lengthy summary and analysis of the evidence, and the district attorney later stated that he was not asking that the defendant be found guilty because the district attorney believed him to be guilty but because the evidence showed beyond a reasonable doubt that he was guilty as charged, the prior statement was required to be understood in conformity with the later statement.

4. Criminal law 🔑720(1), 720½

A prosecutor may state his views, his beliefs and his convictions as to what the evidence establishes and may urge that the evidence convinces his mind, or is conclusive of the guilt of the defendant, and may also state that he does not see how there could be any reasonable doubt about the matter.

5. Criminal law 🔑720(7)

Where statement by district attorney that "Now, even if you don't believe he wrote them" was a part of the argument that even if the defendant did not actually write the checks it would still be forgery if he passed them, knowing that they were false, forged or counterfeited, with intent to defraud any person, there was no misconduct. Pen.Code, § 470.

6. Criminal law 🔑404(4)

In prosecution for forgery and the passing of forged checks, check writing machine, rubber stamps and stamp pad, owned by the defendant, were properly admitted in evidence. Pen.Code, §§ 470, 476.

7. Criminal law 🔑1171(3)

In prosecution for forging and uttering two checks in Contra Costa County, where it was undisputed that check writing machine, three rubber stamps and stamp pad owned by the defendant were found in Amador county, near Jackson, statement by district attorney that they were found in a cave, which was not based on the evidence, was a statement concerning an immaterial matter and was not prejudicial to the defendant. Pen.Code, §§ 470, 476.

8. Criminal law ⚷726

Statement by prosecuting attorney that fingerprints were circumstantial evidence was correct, and where made in response to argument of defendant to jury criticizing prosecution for not immediately submitting allegedly forged checks to a fingerprint test, did not constitute misconduct of counsel. Pen.Code, §§ 470, 476.

9. Criminal law ⚷565
Indictment and information ⚷87(2)

In prosecution for uttering forged checks, information and proof that they were uttered on or about specified time were sufficient. Pen.Code, § 476.

10. Criminal law ⚷1171(3)

Statement by district attorney, in argument to jury, that defendant was identified out of a whole jail full of people and by photographs, which was not supported by the record, was not prejudicial where the defendant was positively identified by several persons.

11. Criminal law ⚷655(6)

A trial judge was not guilty of misconduct in relying on his memory instead of referring to the transcript when jury asked whether they could find the defendant guilty on one count only, since the judge did not need to refer to the transcript in order to tell the jury, as he did, that it could find the defendant guilty or not guilty on one or more counts.

12. Criminal law ⚷1165(1)

In prosecution for forging and uttering two checks, the identity of the person who had found check writing machine, three rubber stamps and stamp pad, admittedly belonging to the defendant, was immaterial and defendant could not have been prejudiced because of inability to ascertain such matters on account of his confinement in jail. Pen.Code, §§ 470, 476.

13. Criminal law ⚷633(1), 655(1)

Record showed that the defendant conducting his own defense had received a fair trial, and that the trial judge had helped the defendant in conducting his defense and had advised him of his legal rights.

◆

Ralph G. Acuff, in pro. per.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Francis W. Collins, District Attorney of Contra Costa County, Martinez, Matthew S. Walker, Deputy District Attorney of Contra Costa County, Martinez, for plaintiff and respondent.

GOODELL, Justice.

By an information in four counts appellant was accused of forging two checks, sec. 470, Penal Code, and uttering them, sec. 476, id. The information also alleged a prior conviction of issuing a fraudulent check in Wyoming, which was admitted. The jury returned a verdict of guilty on each count and appellant was sentenced to the state penitentiary, the sentences on the second, third and fourth counts to run concurrently with that on the first. A new trial was denied and this appeal was taken from that order as well as from the judgment of conviction.

The first count charged the forgery of a check for $82.20 on or about September 25, 1948 with intent to cheat and defraud one Ralph Bellis and the American Trust Company, Livermore office.

The second count charged the uttering of the same fictitious check.

The third count charged the forgery of a check for $82.20 on or about October 5, 1948, with intent to cheat and defraud one William Donel Wood and the American Trust Company, Livermore office.

The fourth count charged the uttering of the last-named fictitious check.

The check covered by the first and second counts is numbered 1014, dated 9–25–1948, drawn on Livermore office American Trust Company, payable to Jack L. Kiessig, for $82.20, signed with a signature difficult to decipher but which looks like "K. H. Geiger" or some similar name. It is endorsed in green ink "Jack L. Kiessig 637 E. 1st. Livermore, Calif."

The check covered by the third and fourth counts is numbered 1015, dated 9–25–1948, drawn on the same bank, payable to the same payee, for $82.20, signed with the same kind of signature, looking, however, more like "K. H. Reigh" or "K. H. Reiger" than "K. H. Geiger". It is endorsed in pencil "Jack L. Kiessig 637 E. Livermore, Calif. Dr. 62669". (The latter figures apparently are those of a driver's license.)

The two checks are substantially identical on their faces except for their different numbers and except for the pencil writing "O. K. Wood" on the upper left-hand corner of 1015, and the differences in the handwriting of the signatures. Each is drawn on a printed form of check of "Livermore Office American Trust Company". Each has protectograph punches through the payee's name. On each "The sum * * * 82 Dols 20 cts" is stamped by a check-writing machine. On each in red rubber stamp appears the printing "A. A. A. Roofing Co." above the penned signature, and near the lower left-hand corner "223 E. Railroad Ave. Livermore, Calif.", and across the left-hand edge "A. A. A. Roofing Co. J. M. Applicator." On the face of each in purple rubber stamp appears "Cannot locate account at Livermore Branch."

A witness employed at the time by Ralph Bellis testified that appellant came into the Ralph Bellis store in Pittsburg, California, purchased merchandise coming to about $22 and tendered check 1014 in payment. It was submitted to Bellis who authorized its acceptance, and the difference between the sale price and $82.20 was given to appellant. The witness testified that appellant endorsed the check in his presence.

At Montgomery Ward & Company's store in Pittsburg, a man identified as appellant sought to cash check 1015. It was submitted to the manager, William Donel Wood. Appellant when asked for some identification produced a temporary driver's license in the name of Jack L. Kiessig. This was deemed sufficient, Wood O. K'd the check in pencil, and appellant received the $82.20 without making any purchase. An employee testified that appellant endorsed it in her presence.

The manager of the Livermore bank testified that he had never heard of any A. A. A. Roofing Co., and knew nothing of a K. H. Reigh or K. H. Leigh in or about Livermore. He also testified that about a dozen checks similar to these two were presented to his bank but were refused payment because they had no such account. Appellant concedes in his brief that A. A. A. Roofing Co. is a fictitious firm.

The following is quoted from the statement of facts in appellant's brief: "On October 24th, 1948, a printing press was found in Amador County * * * and delivered to the Sheriff * * * to be returned to the owner. With the printing press was found: a book of blank checks, a set of three rubber stamps, the same as those used to make the checks above mentioned, and twelve or thirteen uncashed checks, that were, except for the numbers, the same as those cashed in Pittsburg. I, the appellant, reported the loss of the printing press to Sheriff Lucot, and was arrested and held for investigation."

Inspector Clawson of the Pittsburg Police Department went to Jackson with Ralph Bellis who identified appellant then in jail there as the man who had passed check 1014. With the articles already named there were also a "Paymaster" check-writer and protector, a typewriter, two fonts of type and other paraphernalia. A photograph of these articles spread out on a table after having been brought to Pittsburg, with appellant standing beside the table looking at them, is in evidence. Appellant admitted at Jackson that the paraphernalia was his, and in his opening statement to the jury he said: "You have heard him (the District Attorney) outline in detail the pieces of paraphernalia found, how it was acquired, and who it belonged to. That is an admitted fact * * *." Instead of 12 or 13 uncashed checks there were 19 in all, one batch of 6 and another of 13, numbered from 1018 to 1038, minus 1021 and 1032 missing, all dated 9–25–1948, each for $82.-

20; all of them were the same as to bank, payee, and rubber stamping; all protectographed and stamped by a checkwriting machine and all signed with the same kind of signature, the initials "K. H." being distinct and the surnames appearing to be either "Reigh" or Leigh". All 19, in short, were the same in general appearance and content as the two involved herein, except for numbering and the differences in the handwriting of the signatures.

Appellant had had business dealings with Gorman Motor Co. of Jackson and had written two letters to C. Gorman. Both letters, in the handwriting of appellant, were submitted by the prosecution to Dr. E. O. Heinrich for examination and analysis in connection with the checks in question. There was also submitted to him as an exemplar a list of 6 names written by appellant in ink, for the purpose of subpoena for trial. Dr. Heinrich in testifying gave a comprehensive exposition of the writing habits and idiosyncrasies common to the two Gorman letters and the list of names used as exemplars and the checks, and expressed the opinion that the signatures on the checks showed the writer thereof had not attempted to imitate the signature of any person but had attempted to dissimilate the writer's own handwriting. His opinion was that the person who wrote the two Gorman letters wrote the two checks in question. He was cross-examined by appellant exhaustively and without restriction.

The testimony of Bellis and Wood and of the employees of the Ralph Bellis Store and Montgomery Ward & Co, who identified appellant as the man who presented and endorsed the checks in their presence, plus the expert testimony of Dr. Heinrich, plus appellant's admitted ownership of the paraphernalia, made out a strong and convincing case against him. Indeed, in arguing to the jury he conceded that the evidence was "heavy for conviction" and said: "It is so heavy, in fact, that if a man had the slightest doubt of his own innocence he would never have taken a chance of coming in front of you people, before this Judge and this Court and say, 'I am not guilty', unless he knew in his own heart that he was not."

Appellant did not take the stand, but in arguing his case to the jury repeatedly asserted that he "didn't do it".

Numerous points are made by appellant, but we find no merit in any of them.

The jury after deliberating asked for a reading of the testimony of the witnesses Wood and Wallin, and that was done. The jury also wanted "to hear Mr. Acuff's statement regarding Mr. Wood's testimony" to which the court responded that "Mr. Acuff did not take the stand and was not sworn to give testimony in the case, and anything that he might say if not under oath, I am afraid might be in the nature of a self-serving declaration. Do counsel and defendant agree with me on that? Mr. Walker: Yes, Your Honor. Mr. Acuff: Yes, Your Honor." The jury also asked whether it was "possible to find the defendant guilty on one count and not on the other three counts" to which the court responded that "You can find him guilty or not guilty on any one of the counts, one or more * * *."

Appellant states that "it is a known fact that all juries start their deliberations from the first count * * * and continue until all counts are resolved". From that assumption he argues that the jury's request shows "that they were in agreement as to the innocence of the appellant in so far as the first three counts were concerned, but that a question remained to be resolved in regards to count four * * * since counts three * * * and four * * * are the only ones that Mr. Wood's and Mrs. Wallin's testimony had any bearing upon." There is no rule or practice respecting the order in which a jury proceeds with its deliberations, hence what appellant says on that subject is pure conjecture. The jury's inquiry whether it could find defendant guilty on but one of four counts does not prove anything The fact remains that after the court's instruction, which was not unfavorable to appellant, he was found guilty on all four counts.

[1] In his brief appellant quotes a letter which he received after the trial from the foreman of the jury. This letter of course is no part of the record and cannot be con-

sidered. Nor is there now any way of making it part of the record, since it was not before the court on the motion for new trial.

[2] Appellant claims the district attorney was guilty of misconduct in not calling the Sheriff of Amador County, and that the judge should have compelled him to do so. His argument that as the Sheriff was the arresting officer he was "a logical state witness" is without any foundation since the arrest in Amador might have been made for some offense (not shown by the record) wholly unrelated to the offenses on trial. The Amador Sheriff's testimony certainly was not needed to prove forgeries committed in Contra Costa County, nor to prove appellant's ownership of the paraphernalia since that had been freely admitted in both counties. The place (whether in a cave or elsewhere) where it was found or the circumstances attending its discovery were not relevant or material. The district attorney was under no duty to call the Sheriff, and the judge could not, with propriety, have compelled him to do so. In the same connection appellant speaks of constitutional guaranties, but no principle of confrontation —which appellant is apparently driving at— was involved or violated. Appellant was confronted by the witnesses against him, namely, the persons who were eyewitnesses in Contra Costa, not Amador County, to his endorsement and cashing of the two checks. The Sheriff, had he been called to the stand, could have added nothing by way of confrontation. Had the appellant required his testimony he could have had it, for he was given the opportunity to subpœna witnesses, and gave the jailer a list of six persons which did not include the Sheriff. At the close of the people's case when appellant found they had not called the Sheriff he could still have called him. The record shows that when the taking of testimony was about to open appellant stated that he would not need any witnesses other than Chester Oeth and the court on appellant's request excused the others. There was no basis for appellant's assumption that the prosecution would call Sheriff Lucot and appellant never indicated to the trial court what he would have testified to and does not now give any such indication.

In his arguments the district attorney said: "I am completely satisfied in my own mind, after carefully reviewing all this evidence for several months, that Ralph G. Acuff is guilty on every single one of these counts" and "Now, even if you don't believe he wrote them, and I do and I think you do * * *" and "I don't see how there could be any reasonable doubt". Appellant contends that these statements were misconduct.

[3-5] The district attorney's statement that he was completely satisfied that appellant was guilty on every count was made following a lengthy summary and analysis of the evidence, see People v. Pratchner, 9 Cal.App.2d 451, 454, 50 P.2d 75—wherein he pointed out, among other things, that the people's witnesses were uncontradicted—and it must be assumed that when he said *he* was satisfied of appellant's guilt he meant *because the evidence showed it.* Later on he expressed himself with emphasis not on *his* belief but on *what the evidence showed,* as follows: "I am not asking you to find Ralph Acuff guilty on four counts as charged because I believe he is; I am asking you to find him guilty on all four counts because the evidence shows beyond a reasonable doubt that he is guilty as charged * * *." It is in this latter sense that his earlier remarks must have been understood. A prosecutor "has the right to state his views, his beliefs and his convictions as to what the evidence establishes, and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant." 8 Cal.Jur. p. 268; People v. Romero, 143 Cal. 458, 460, 77 P. 163; People v. Weber, 149 Cal. 325, 340, 341, 86 P. 671; People v. Rogers, 163 Cal. 476, 482, 126 P. 143; People v. Kelly, 69 Cal.App. 558, 563, 231 P. 767. The same is to be said respecting his statement "and I don't see how there could be any reasonable doubt". When the district attorney said "Now, even if you don't believe he wrote them" it was a part of his argument that even if appellant did not actually *write* the checks it would still be

forgery if he passed them "knowing the same to be false, * * * forged, or counterfeited, with intent to * * * defraud any person;" section 470, Pen.Code. We find no misconduct in any of these remarks.

[6] Appellant next attacks the manner in which the paraphernalia was laid before the court. When it was offered for identification appellant volunteered the statement that the photograph (already referred to) "appears to include all the material." There was no doubt as to the admissibility of the checkwriting machine, the three rubber stamps, and the stamp pad. The jury were entitled, for instance, to examine the three rubber stamps and compare them, and the prints they made, with the rubber stamping on the checks. There was no question of trickery or fraud in the introduction of these physical objects and it is obvious that they had strong and convincing probative force.

[7-9] Appellant contends that the district attorney on three occasions wilfully misrepresented the facts. First, in his opening statement when he said: "All of this was found in a little cave in Amador County, near Jackson." There was no evidence as to where the paraphernalia was found. In appellant's brief it is stated that it was found in Amador County. Whether found in a cave or elsewhere is not material. The only statement which is outside the record is with respect to the cave—a wholly immaterial incident. The second assignment of misrepresentation is a statement in the closing argument that "Finger prints are circumstantial evidence," which of course is true. Moreover, this obviously was in response to the argument of appellant to the jury in which he criticized the prosecution for not immediately submitting the checks to a finger print test. The point is without merit. The third assignment was the statement that "we have no knowledge of when these checks were passed." That, also, is true since none of the persons connected with the two stores was able to fix the time any closer than late September or early October and they did not attempt to guess at it. The information charged, as usual, "on or about", and the court correctly ruled that this sufficed both as to allegation and proof.

[10] The district attorney said to the jury "This man was identified * * * out of a whole jail full of people and by photographs * * * while the evidence shows that when Bellis first identified appellant in Jackson there was but one other man in the cell. Moreover appellant was not identified by photographs. The statement, while loose and inaccurate, was not important and certainly not prejudicial since he was positively identified in person by several witnesses.

Misconduct is charged against the judge because he said "We can probably have it submitted by tomorrow afternoon around three o'clock". This, appellant argues, kept the appellant from asking that time be allowed to have the Sheriff ordered from Jackson, a matter already discussed.

[11] Misconduct is charged because the judge relied on his memory instead of referring to the transcript when the jury asked if they could find appellant guilty on one count only, a matter already dealt with. The judge did not need to refer to the transcript in order to tell the jury, as he did, that it could find appellant guilty, or not guilty, on one or more counts.

[12] Under the heading of "New evidence" appellant complains that because of his confinement he could not properly investigate the case. He quotes from a newspaper article in the "Stockton Record" and one in the "Sacramento Bee" dealing with the discovery of the paraphernalia in a cave by an unidentified tourist. Appellant argues that had he been at liberty he could have learned of these newspaper articles in time to ask the questions "Who found the equipment?" and "What did he look like?" questions which for reasons already given, would have been irrelevant to the issues whether two forgeries had been committed and two fictitious checks uttered.

[13] Appellant's statement that "The constant fighting and bickering that was necessary for the defense to secure even the

slightest bit of consideration, placed the appellant in a position of great 'surprise' which ordinary prudence could not have guarded against" is utterly without justification or support in the record. From the outset the judge advised appellant as to the conduct of his defense. He informed him of his right of challenge in the selection of the jury. He instructed him how to properly frame questions. At one point he said "Come, fight up, Mr. Acuff." Throughout he showed the utmost consideration, and the record indicates that he was ever mindful that the defendant, a layman, was conducting his own defense. In the presence of the jury he expressed his appreciation of the way appellant had handled himself in court. The record instead of showing "constant fighting and bickering" shows merely that the appellant was doing the best he could to make what was clearly an up-hill fight, up-hill not because of courtroom opposition but because of what he admitted to the jury was "heavy" evidence against him. The record shows that there was no conduct of the district attorney which went unreasonably or unfairly beyond the ordinary attempt of a prosecuting officer to lay the facts before the jury. It is true that at least once the judge of his own motion—and doubtless because appellant was acting as his own attorney—stopped the district attorney when, had the defendant been represented by counsel, he probably would have awaited an objection, but the district attorney at once conformed and no prejudice resulted. Appellant had a fair trial of case in which the evidence was "heavy for conviction" to say the very least.

In discussing appellant's numerous contentions we have avoided reference to the absence from the record of objections or assignments of error and misconduct, treating the several matters, for the purpose of the discussion, as though such objections and assignments had been interposed.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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94 Cal.App.2d 480

ZOTTARELLI et al. v. PACIFIC STATES SAVINGS & LOAN CO. et al.

No. 13994.

District Court of Appeal, First District,
Division 1, California.

Nov. 7, 1949.

As Corrected Dec. 7, 1949.

Hearing Denied Jan. 4, 1950.

Lawrence Zottarelli and others sued the Pacific States Savings & Loan Company and others in a class action in behalf of all creditors similarly situated.

The Superior Court, City and County of San Francisco, Edward P. Murphy, J., rendered judgment for defendants, and plaintiffs appealed.

The District Court of Appeal, Bray, J., affirmed the judgment, holding that the Building and Loan Commissioner who was liquidating insolvent named defendant by accepting a plan whereunder investment certificate holders who sold certificates to a defendant corporation were deprived of their rights to interest should assets after payment of principal be sufficient to pay interest, did not violate duty to certificate holders as trustee.

1. Building and loan associations 🔑42(6)

The Building and Loan Commissioner, upon taking possession of building and loan association and throughout liquidation of association, has status of a trustee of trust in private property.

2. Trusts 🔑173

A trustee is under duty to beneficiary to administer trust solely in interest of beneficiary.

3. Trusts 🔑179

A trustee is under duty to beneficiary to keep and render clear and accurate accounts with respect to administration of trust.

4. Trusts 🔑179

Ordinarily a trustee is not under a duty to beneficiary to furnish information to him in the absence of a request for such information.

5. Trusts 🔑179

Even if trustee is not dealing with beneficiary of the trustee's own account, he is under a duty to communicate to beneficiary material facts affecting interest of beneficiary which trustee knows beneficiary does not know and which beneficiary needs to know for his protection in dealing with third persons.

6. Trusts 🔑179

If beneficiary is about to sell his interest under trust to a third person, and trustee knows beneficiary is ignorant of facts known to trustee which make interest of beneficiary much more valuable than beneficiary believes it to be, trustee must inform beneficiary of such facts.

7. Building and loan associations 🔑42(17)

In liquidation of insolvent building and loan association, investment certificate holders are entitled to interest if and when, after payment of principal, there are assets from which interest can be paid.

8. Building and loan associations 🔑42(17)

Acceptance by Commissioner liquidating insolvent building and loan association of a plan whereunder holders who sold investment certificates to a corporation were deprived of rights to interest should assets after payment of principal be sufficient to pay interest, and commissioner accepted certificates sold to corporation as payment when association assets were sold, and both principal and interest was written off on association books as association assets were sold, although association paid only for principal, was not a violation of Commissioner's duty to certificate holders as trustee.

9. Building and loan associations 🔑42(17)

Evidence did not establish that acceptance by Commissioner liquidating insolvent building and loan association of a plan whereunder holders sold investment certificates to a corporation was result of conspiracy to deprive certificate holders of their interest rights for unjust enrichment of association and its sole stockholder.

10. Building and loan associations 🔑42(17)

Commissioner liquidating insolvent building and loan association, who accepted plan whereunder holders sold investment certificates to a corporation, was not chargeable, under evidence, with violating his duty as trustee by failing to disclose completely to certificate holders facts known to him relative to likelihood of holders receiving interest.

11. Building and loan associations 🔑42(4)

A fiduciary relationship did not exist between sole stockholder of insolvent building and loan association being liquidated, and investment certificate holders, or between certificate holders and a corporation to which rights to interest on certificates brought by sole stockholder were assigned, so as to require sole stockholder and corporation during liquidation to observe the duties toward certificate holders required of a fiduciary.

12. Building and loan associations 🔑42(4)

Corporations which through their spokesman obtained acceptance of Building and Loan Commissioner liquidating insolvent building and loan association of a plan whereunder holders sold investment certificates to one corporation did not violate an alleged implied contract to do nothing which would wrongfully deprive holders of investment certificates of their rights.

Cushing, Cullinan, Trowbridge, Duniway & Gorrill, San Francisco, Wood, Crump, Rogers & Arndt, Guy Richards Crump, and Ralph W. Evans, Los Angeles, for appellants.

Sullivan, Roche, Johnson & Farraher, San Francisco, Hanna & Morton, Los Angeles, Gardiner Johnson & Roy D. Reese, San Francisco, for respondents Pacific States Savings & Loan Co., State Guaranty Corp., and Pacific States Auxiliary Corp.

Albert A. Rosenshine, San Francisco, Fred N. Howser, Attorney General, Herbert E. Wenig, Deputy Attorney General, for respondent Frank C. Mortimer, individually and as Building & Loan Commissioner of the State of California.

BRAY, Justice.

In an action brought by plaintiffs as a class action in behalf of all creditors similarly situated, the court rendered judgment in favor of defendants. Plaintiffs appeal.

Contentions.

The question to be determined is the validity of assignments made by certain certificate holders in defendant Pacific States.[1] Plaintiffs contend these assignments are void and should be set aside because of (1) alleged breach of trust by defendant commissioner; (2) violation by the corporate defendants of a duty owed a fellow beneficiary and of an implied contract that nothing would be done to deprive claimants wrongfully of their rights.

Facts.

Although the reporter's transcript is 2682 pages long (the briefs total 1104 pages plus 94 pages of appendices), there is very little conflict on the facts. The conflict is on the inferences, deductions and legal conclusions to be drawn from them.

Plaintiffs and the class they represent were, and it is contended now are, investment certificate holders in Pacific States. They number about 26,730, and the original face amount of their claims aggregated about $24,595,210.97. Guaranty owns all of the outstanding stock of both Pacific States and Auxiliary.

Pacific States was incorporated as a building and loan association in 1899 and continued to do business until its seizure by the then Building and Loan Commissioner on March 4, 1939. At this time, as held in Pacific States Sav. & Loan Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809, 158 A.L.R. 955, Pacific States was insolvent, its assets being impaired to the extent of over $10,000,000, without considering its liabilities to its investors. Hise case, 25 Cal.2d at page 832, 155 P.2d 809, 158 A.L.R. 955. Although started in 1939, the Hise case was not finally determined until January, 1945, when the United States Supreme Court refused to take jurisdiction following the action of the California Supreme Court upholding the decision of the superior court to the effect that the seizure was justified. During the period of this litigation the successive commissioners were not free to sell the assets of the company, which consisted of real estate. Title insurance companies would not issue policies without quitclaim deeds from Pacific States and Guaranty. Robert S. Odell was the chief spokesman for all of the corporations and generally was unwilling to supply quitclaims unless the commissioners would accept surrender of certificate holders claims instead of cash for the purchase price of the real property sold.

Defendant Mortimer became commissioner in January, 1943. From the initial seizure in 1939 up to the time of the assignments hereinafter mentioned, all necessary procedural steps had been taken by the various commissioners in the liquidation proceedings. Notice to creditors had been given, claims approved, and some rejected. Liquidating dividends had been declared and paid totaling 37½ per cent of the face amount of the claims, and it was expected that further liquidating dividends of 10 per cent each would be paid on November 1, 1945, and February 1, 1946. (These were paid to the then holders of uncancelled claims.) In 1939 the then commissioner, although he believed Pacific States to be insolvent, accrued interest on investment certificates, and he and his successor commissioners did likewise yearly thereafter. This interest varied from 2 per cent the first year, 1½ per cent the next three years, to 3 per cent the last 3 years.

After the Hise case was ended, defendant commissioner made a number of sales without certificate claims being involved. These sales were approved by the superior court, but Pacific States appealed from the court orders approving the sales. This delayed their completion for an indefinite period.

Shortly after defendant commissioner took office he was sought out by Odell for conferences designed to break the existing deadlock with respect to the sale of assets, and to discuss other matters, such as a pending assessment suit against Guaranty, and proposed legislation applying to

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[1] Defendant Pacific States Savings and Loan Company will herein be referred to as Pacific States; defendant State Guaranty Corporation as Guaranty; defendant Pacific States Auxiliary Corporation as Auxiliary.

Pacific States. Throughout subsequent meetings the two men developed hostile and antagonistic attitudes towards each other. Odell wanted the commissioner to drop the assessment suit, to take in claims on sales of assets and to sell only certain undesirable properties.

On September 11, 1944, a long hearing was held before Judge Robinson, both Odell and the commissioner being represented by counsel. Judge Robinson met alternately with each side, trying to find possible points of agreement. Finally, agreement was reached on a number of issues, and, with respect to sales of assets, Judge Robinson announced that the commissioner had agreed to take in claims for ⅓ of the price, valuing such claims at the court's valuation of 60 per cent of the original principal amount. (There was still unpaid 82½ per cent of the original principal amount, so that the 60 per cent surrender value was a discount). The commissioner at this time apparently did not believe the claims would ever be paid off 100 per cent on the principal. In July of 1943 he had written to all claimants as follows, in part: "If the assets are sold and the proceeds distributed to you by the State, it is estimated that your recovery will be at least 60 per cent or 70 per cent in addition to the 17½ per cent already paid."

At the conclusion of the September 11, 1944, meeting, Judge Robinson also announced that Odell agreed to furnish the required quitclaim deeds to all sales. Judge Robinson stated that the commissioner believed claimants should ultimately receive interest, that the courts should decide the proper rate, and that the commissioner would not later argue for or against a rate of 7 per cent.

Thereafter, some sales were carried out in accordance with this agreement. Whenever claims were surrendered on sales, either before or after September 11, 1944, the books of Pacific States showed a reduction of certificate liability equal to the remaining principal amount of the particular claim, and a reduction of the accrued interest liability equal to the amount of interest which would have been accrued on that claim at the "commissioner's rates."

In 1943 section 16.04 of the Building and Loan Association Act, Gen.Laws, Act 986, was adopted, through the efforts of Odell. This section provides in general that investment certificate holders in associations whose assets are held by the commissioner, together with unsecured creditors, can petition the court and withdraw assets to themselves. When a group holds 25 per cent of the certificates it can withdraw 25 per cent of the assets, and subsequent withdrawals of 10 per cent may be made thereafter. Early in 1945 Odell began negotiating with banks to raise money to purchase certificates and was threatening the commissioner with withdrawals of assets.

Due principally to the war, the real estate market had boomed, the value of the Pacific States assets had increased materially, and by the middle of 1945 it began to appear from the court's appraisal that, unless there was a change for the worse in the real estate market, the assets of Pacific States should bring sufficient prices, if sold, at least to pay in full the principal of all claims.

The court, in determining values for surrender of certificates in purchase of property, at one time had fixed the value of certificates as 50 cents on the dollar, at another as 60 cents on the dollar. The claims used at that time were mostly those purchased on the open market and for which the seller received no more than the amounts set by the court. None of the Odell group were purchasers of property at this time.

Early in 1945 the commissioner received an over-all bid in the sum of approximately 20 million dollars for all of the remaining assets excepting only certain cash on hand. In May he submitted the bid to the court without recommendation as to its acceptance. The court appointed its own appraiser of the assets. The hearing was continued from time to time, and finally heard on October 15.

In conferences between Odell and the commissioner within the two days preceding the hearing of October 15, and on that day in the judge's chambers, an understanding was reached by which certificates would be valued at 100 cents on the dollar, would be accepted by the commissioner, and their acceptance authorized by the court, on sales for all or most of the purchase price. This agreement was put into definite form. It was understood that a corporation known as the Robert S. Odell Company would borrow money from banks, which money would be used to purchase investment certificates at a price to equal the unpaid principal (that is, 100 cents on the dollar, less the amount of the liquidating dividends theretofore paid). These certificates were to be pledged with the bank as collateral security for the loans, Odell company would advance this money so borrowed to Auxiliary, which would make the offers to purchase and would purchase the certificates. Then Auxiliary for a consideration of $100 would assign to Guaranty all rights to receive interest on the purchased certificates. Auxiliary would assign the purchased certificates to the bank, but would advise the bank that it had assigned to Guaranty the contingent interest on the certificates. The way the plan would work was this: A purchaser of a parcel of real property, upon his bid being approved by the court, would deposit in cash the amount of his bid in escrow with instructions to purchase from Auxiliary certificates for the unpaid principal amount, the contingent interest portion of these certificates having already been assigned to Guaranty. Then upon receipt of a deed from the commissioner, such certificates would be surrendered to the commissioner in payment of the purchase price of the property sold. The commissioner then would reduce on the Pacific States books the remaining principal amount of the particular certificates surrendered. Guaranty, which would now own the right to the interest, if any, on said certificates, would donate to Pacific States the interest portion of the certificates. This method was arrived at to avoid income taxes, as a gift to the company of indebtedness to a stockholder was not taxable income. The effect of this plan was that a certificate holder received the balance of principal, but no interest, both the principal and interest liability was written off on the Pacific States books, although it had only paid for the principal, and the stockholder of Pacific States, to wit, Guaranty, in effect would eventually receive the benefit of the nonpayment of interest to the certificate holders. All appeals by Odell and his corporations were to be dismissed and all controversies between him and the commissioner ended by this agreement. The commissioner went with Odell to the Wells Fargo Bank, the American Trust Company, and the Bank of America, and told officials of each, in effect, that he would go along with the plan.

Loans were obtained from which certificates were bought and used in the payment of the purchase price of assets under the above plan. Odell prepared a letter to go with an assignment form to each stockholder. This letter he submitted to the commissioner, who would neither approve nor disapprove it. On October 25 the letter was sent out offering to purchase certificates at an amount equal to the full remaining principal balance of each certificate. It then said: "Interest, if any, on claims is payable only after complete payment of principal to all claimants, and the interest heretofore declared by the Building and Loan Commissioner is disputed and in controversy. If you want the full amount of your investment now, without awaiting further liquidating dividends and the final adjudication of the interest controversy, you should sign and date the enclosed assignment and send it to the undersigned." Three other letters were sent out by Auxiliary, all of which presented a discouraging picture as to the possibility of holders ever receiving any interest on their claims. Between that date and March 1, 1946, most of the certificate holders in whose behalf plaintiffs sue assigned their certificates. On February 28, 1946, the commissioner sent out a letter to the certificate holders in which he stated that the court's appraisal of October 10, 1945, showed that the assets were valued at an amount sufficient to pay not only the full face amount of each claim, but such interest as might thereafter be determined, and called attention to the fact that a suit had been filed in behalf of claimants seeking to establish 7 per cent as the interest which should be paid. From then on, there were very few, if any, assignments of certificates. The certificate holders who had not assigned their certificates eventually received the full balance of principal and a sum equal to interest as set up by the commissioner on the company books. This sum was paid by Pacific States as a compromise of the interest claims of the certificate holders, after it regained possession in 1946 of the remaining assets.

Duty of the Commissioner.

[1–6] Before detailing the commissioner's acts, let us see what his legal duty was toward the certificate holders. This duty is set forth in Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, where the court was considering the status of one of the commissioner's predecessors with reference to the liquidation of this very company. The court said, 14 Cal.2d at page 573, 96 P.2d 107, 113: "* * * it appears appropriate to consider the status of the commissioner upon taking possession and throughout liquidation. During such time, the commissioner has the status of a trustee of a trust in private property, or in other words, the status of a trustee of a private trust. As was said in Richardson v. Superior Court, 138 Cal.App. 389, at page 394, 32 P.2d 405, at page 407, 'While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is subject to certain prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which, for reasons of public policy, has been made to include a trust in private property.'" Section 170 of the Restatement, Trusts (vol. 1) says: "(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Section 172 provides: "The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Comment (d) to section 173 is as follows: "Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. * * * Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be, the trustee is under a duty to the beneficiary to inform him of such facts."

The commissioner here was taking part in the over-all transaction. He agreed in advance that he would accept certificates on sales, he allowed Odell to get the names and balances from the books, he verified the signatures and amounts on assigned claims, and he carried out his promise to accept certificates. He knew that Auxiliary was soliciting assignments of claims, including interest rights. He saw in advance the letter to be sent claimants. It would seem difficult for a court of equity to say that the commissioner was not taking part in the transactions.

Plaintiffs contend that the commissioner violated his duty as trustee in two respects: (1) that his agreement to accept surrender of certificates from which the interest rights had been separated for the purchase of assets, was in fraud of the rights of the certificate holders; (2) that he failed to disclose properly and completely to the certificate holders the facts known to him, and should have advised them not to dispose of their certificates. Defendants other than the commissioner contend that the certificate holders in no event would have been entitled to interest, and hence having received 100 per cent of the principal, have nothing about which they are legally entitled to complain.

1. Interest.

[7] The first question to be determined is whether in the liquidation of a building and loan association its investment certificate holders would be entitled to interest, if and when, after payment of principal, there should be assets from which interest could be paid. The contract with each holder provided for interest "at such rate as shall be determined by the Board of Directors of the Association." After seizure, no rate was determined by the board. The right to interest in the liquidation of a bank by the depositors in the commercial as well as in the savings department of a bank, where the California Bank Act was silent on the subject, was determined in the case of Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328. By analogy, that case, as to the right to interest, is controlling here. In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 134, 99 P.2d 251, the court approved the holding in the Greva case, saying, 15 Cal.2d pages 146-147, 99 P.2d at pages 256:

"The statute expressly places the investment certificate holders in a more favorable position than the membership shareholders; * * * The law gives preference in the matter of payment of the claim, which, reasonably interpreted, means the principal sum due; and this claim has already been satisfied in full. As to interest the statute is silent. And, in view of that silence, the statutory preference should logically end at that point, and the problem must then be solved in accordance with the usual equitable principle governing liquidation, namely, the principle of equality among creditors. Stated broadly, the rule is that one creditor is not entitled to payment of interest on his claim in receivership, bankruptcy, or other form of liquidation, after the commencement thereof, where the assets are not sufficient to pay the principal of all claims in full. See, Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328; Glenn on Liquidation, secs. 488, 510.

"The above rule was announced by this court recently, upon a full review of the authorities, in Greva v. Rainey, supra. A bank was in liquidation and the respective rights of stockholders and various depositors were involved. This court held first that the depositors, as creditors, were entitled to payment of not only the principal of their claims but interest during liquidation, before any payments should be made to stockholders. This distinction between the rights of creditors and stockholders is well settled, and as applied to the present case, would mean that any of the various kinds of creditors of the association would be entitled to interest as against the guarantee stockholders."

See also People v. California etc. Trust Co., 34 Cal.App. 269, 167 P.2d 181, and Allen v. Cal. Mutual Bldg. & Loan Ass'n, 22 Cal.2d 474, 490, 139 P.2d 321.

2. Did the Commissioner Violate His Trust in Approving the Certificate Surrender Plan?

[8] The trial court held that he did not. To upset this holding we must find, as matter of law, that the trust was violated. Taking all the circumstances as they appeared to the commissioner at the time, we cannot say that the commissioner violated any duty to the certificate holders in approving the plan. It must be remembered that ever since the original seizure in 1939 successive commissioners had been obstructed in their attempted liquidation of the affairs of the company by the Odell group by lawsuits and other methods. There were 61 separate appeals pending from attempted sales which had been approved by the court. The title companies refused to issue title insurance policies without quitclaims from Odell and his companies. Question was raised as to whether, even if the assets should prove sufficient, the commissioner could pay interest and if so, in what amount, and Odell refused to give these quitclaims unless the right to interest on the certificate claims should be separated from the right to principal, and the interest right assigned to Guaranty, and his plan agreed to. Also, while the then appraisements showed that the assets were enough to pay principal and probably to pay interest, if it legally could be paid, such result depended upon the real estate market not changing for the worse. How

steady the market was, was a matter of conjecture. The plan suggested would end all litigation and controversy, would enable those holders who desired to do so, to get their principal now without further delay and without uncertainty. Nearly six years had elapsed since the seizure of the company. With the 10 per cent to be paid on November 1, only 47½ per cent would have been paid in liquidating dividends. Certificates were being sold on the street in large quantities and were being transferred on the books of the company. Odell was continuing his efforts to regain the properties and to force the commissioner to accept certificates instead of cash in payment for real property and to return the assets to Pacific States. Certificates were being used in payment on sales under court order. Odell was endeavoring to acquire 25 per cent of the outstanding certificates in order to withdraw assets. No one would bid higher on the over-all assets when the court refused to accept the 20-million dollar bid. It could not be foretold how many parcels would be bid for on the individual basis nor at what price. Odell's plan met with the approval of the attorney general's office and the court. The suggestion that upon the surrender of the certificates an entry should be made showing a debit to "interest reserve" and a credit to "contributed capital" was made by the commissioner's tax expert with the advice of the attorney general. The commissioner, exercising his discretion in accordance with section 13.16a of the Building and Loan Act, had estimated the surrender value of the certificates at 100 cents on the dollar. On November 5 the court determined the surrender value to be that amount.

[9] Plaintiffs contend that there was a conspiracy between the commissioner and the Odell interests to deprive plaintiffs of their interest rights for the unjust enrichment of Pacfiic States and its sole stockholder Guaranty. There is no evidence of any such conspiracy. It is obvious that the commissioner, in good faith, felt that a plan which enabled the holders to receive 100 cents on the dollar immediately, without awaiting the hazards of the future to determine whether they would receive interest in an amount which would require court action to determine, assuming that the real estate market did not change for the worse, was a fair plan. Moreover, the commissioner knew that certificates were selling on the open market for 50 to 60 cents on the dollar. Under the proposed plan the holders would now receive 100 cents on the dollar instead. Hindsight is better than foresight. Looking back we can see that the market did remain firm, even got better. But in 1945, with the boom days of the war behind, it was very doubtful as to the market's future. Many informed persons predicted a slump. Practically all steps taken by the commissioner were after consulting and upon the advice of the attorney general's office.

As conditions then existed, the plan was a fair one. Even if we conclude that it might have been better for the commissioner to refuse to countenance the plan, take chances on the future of the real estate market, the litigation, the obstructive tactics he was being met with, and to force the holders to wait and see if they could receive 100 per cent on the principal and interest, rather than to effect a fairly immediate liquidation, such conclusion is not the only reasonable one to be drawn from the then circumstances. Therefore, we cannot say, as matter of law and against the findings of the trial court, that the commissioner breached his duty in approving the plan.

3. Disclosure of Facts by Commissioner.

[10] This brings us to the question of whether the commissioner made a full and complete disclosure of the facts within his knowledge. Inasmuch as the bulk of the assignments were made in the period October 25, 1945—March 1, 1946, it is the acts of the commissioner at and prior to that period which are significant here. From time to time the commissioner and his predecessors had made reports to the certificate holders of the progress of the liquidation and the financial situation of Pacific States. On January 30, 1940, the then commissioner wrote to the holders stating that he was paying a 7½ per cent dividend and gave a long recitation of the liquidation progress, the obstacles that had been overcome in-

cluding Odell's objection to the payment of the dividend. It severely criticized the "ousted Odell management." In black face type it urged the holders not to sell or trade their certificates and in effect to beware of the Odell propaganda. On October 8, 1940, another letter was sent to the holders informing them that an additional 5 per cent dividend would be paid November 1. It gave the status of the litigation then pending and again in black face type urged the holders not to part with their certificates, stating that in the then commissioner's opinion they were worth considerably more than was being offered for them. A letter dated November 1 accompanied the dividend check. Again the then commissioner advised the holders to keep their certificates, and pointed out that no one would be likely to buy their certificates unless he was sure that their actual value was considerably higher than the price offered.

On September 22, 1941, the then commissioner's letter informed the holders of the payment of another 5 per cent dividend, of the then status of the litigation, and again in black face type urged the holders not to part with their certificates. It again stated that in the commissioner's opinion they were worth considerably more than the prices then being offered for them. On May 5, 1942, the then commissioner sent notices to the certificate holders to file proofs of claim, and in the accompanying letter pointed out that he had already paid 17½ per cent in dividends, intended to conduct an orderly liquidation of the affairs of the company, unless prevented from doing so by the litigation then pending, that there would be no wholesale disposal of the properties, those which could not be sold to advantage would be held, and that an inventory of the assets was being made and when made would be open to inspection.

On July 15, 1943, defendant commissioner sent a letter to the holders calling attention to his recent appointment as commissioner and stated that payments would have been made to them were it not for legal appeals taken by Odell which blocked the sale of assets and payments to claimants and creditors. He then called attention to the recent amendment to the Building and Loan Act which permitted withdrawal of assets and asked the holders to express to him their preference as to one of three possible steps he could take. In italics he urged the holders not to sell or part with their claims as they were supported by substantial values. He estimated that the eventual recovery would be an additional 60 or 70 per cent which with the 17½ per cent already paid would make a total recovery of 77½ or 87½ per cent. Accompanying the letter was a statement of the status of all litigation then pending, setting forth the history of the payments on claims made to date, discussing new legislation affecting the liquidation proceedings and the financial situation of the company. It pointed out that Odell had made certain proposals to terminate the litigation if the commissioner would agree to certain things, among them being that the commissioner would not interfere with Odell's attempts to secure consents of certificate holders to reorganization or segregation of assets. The commissioner stated that the proposals did not appear to him to be in the best interests of the claimants and creditors. Included is a statement of financial condition (book values and estimated values) as of May 31, 1943. This statement shows book values of liabilities, in round numbers, of 45 million dollars with estimated values of only 34 million, a difference of over 11 million. Concerning interest, the statement set forth that accrued interest to certificate holders was not set up on the general books of the corporation. "However, the obligation to pay certificate interest for the period from March 4, 1939 to May 31, 1943, is recognized as an added liability of the company to the certificate holders and in fact has been deducted as such in Income Tax returns." The statement showed that the operation of the properties by the commissioner was now showing a net operating profit to certificate holders of 6 per cent.

On June 14, 1944, defendant commissioner sent out a letter designated "Report No. 2." This set forth the status of the litigation, discussed income taxes and reserve for contingencies, gave the result of the official poll of holders on reorganization, liquidation or segregation of assets, showing that 81.27 per cent voted for sale of assets in preference to the other steps. It stated that the commissioner intended to liquidate, showed that litigation still held up any further payments to holders, but that the commissioner hoped eventually to make substantial payments. It stated that it had come to the commissioner's attention that numerous holders had been approached to sell their claims at a discount. It pointed out that although the commissioner could not state, with any degree of certainty, what amount would be received ultimately by claimants, it was apparent substantial additional payments would be made, and that claimants should receive considerably more through orderly liquidation than they would receive from current sales of claims to persons "now attempting to purchase such claims at their own prices." It further pointed out that a mass of misinformation and untrue propaganda was being circulated and suggested that claimants get their information from offices of the commissioner. It then stated the policy of the commissioner to the effect that there should be no repetition of the abuses theretofore suffered by the investors in Pacific States and summed up his policy in four words: "Sell Assets—Pay Claimants." If any equity could exist for the stockholders their interests would be protected, but the "claimants come first." Financial statements as of April 30, 1944, were then attached showing the assets as $39,172,787.50, and liabilities at the same amount. A note called attention to a figure of $3,703,641.80 as "interest accrued on investment certificates and certain other claims during the period March 4, 1939, to December 31, 1943, primarily at rates declared by the Building and Loan Commissioner * * *. The payment of accrued interest is contingent upon the ultimate payment in full of all approved claims as of March 4, 1939, * * * and is subject to possible redetermination at that time." In a condensed income statement appears an item to the effect that "Interest Declared on Claims" in the sum of $1,074,696.49 had not been deducted from this condensed statement. A graphic chart was enclosed which compared the gross income and net profits under the Odell management and under state management, showing a huge increase in both under the latter management.

On September 30, 1944, defendant commissioner sent out a brief letter enclosing dividend checks bringing the total dividend paid to date to 27½ per cent. It gave a brief statement of the reduction of indebtedness and then stated that as sales of additional assets were authorized by the court and completed, further payments would be made. On March 15, 1945, Report No. 3 was made. Enclosed with it was another 10 per cent dividend, bringing the total paid to 37½ per cent. A financial statement was enclosed which the letter said showed that the claims of the holders were supported by substantial values. This statement showed assets as $32,663,852.96 and liabilities at the same amount. The real estate was valued at $24,921,230.71. "Accrued Interest on Claims" is shown as $4,347,670.99, with a note stating, "Contingent upon payment in full of all approved claims, interest may be paid to the extent that any available funds will permit." In reconciliation of surplus appears this item: "Add: Interest declared on claims [$]930,113.93."

On July 2, 1945, Report No. 4 was sent out. The commissioner had planned on August 1 to make a payment of 32½ per cent, but appeals from court orders authorizing sales prevented payments being made. It stated that certain proposals had been made by Odell to the commissioner which it was claimed would return to holders 100 per cent plus interest at 1 per cent which proposals the commissioner had turned down for the reasons he set forth. The commissioner believed that under the best possible management and sale the assets would not be sufficient to pay 100 per cent to the holders, "plus earned and declared interest." He pointed out that "Claimants have first and prompt call on the proceeds of sales" and that "When and if your claim and all others are paid in full, with interest," the residue, if any, would be turned over to the sole stockholder, Guaranty. The commissioner "cannot use your claim for bargaining purposes with those who broke faith with you." The report discussed the pending litigation and Odell's obstructive tactics, and enclosed extracts from Governor Warren's veto message on a bill whose passage was urged by Odell, providing for a return from liquidation of the assets of a building and loan association under certain conditions. The report stated that the commissioner had received a bid of 20 million dollars for the assets of the company (not including $2,300,000, thereof), and that a hearing on the commissioner's petition to the court to sell all the assets to the highest bidder was set for August 21, and ended (in italics), "Let the record show that every effort is being made [to] pay maximum amounts obtainable on your just claim." Enclosed were certain matters purporting to reflect on the former management of Pacific States.

Up to this point, there can be little doubt but that the commissioners, including defendant, were making fair and full disclosures of the situation of the company. They were excoriating Odell, showing that he was trying to make deals with the commissioner which in the opinion of the commissioner were not for the best interests of the holders, that most of the principal would eventually be paid the certificate holders, and that they should receive interest, as well. The holders were strongly importuned not to dispose of their certificates. Each letter or report was apparently designed, among other things, to convince the holder that it was better for him to hold his claims than to dispose of them. Up to this point, too, the defendant commissioner had refused to consider any of Odell's propositions. But between now and his next letter, that of November 1, he agreed to accept surrender of certificates under what, for brevity, we will call the Odell plan, in which the claims for interest and principal were separated. While he stated that he would be neutral and refused to approve or disapprove the form of letter Odell intended to send out, his agreement, with full knowledge of the Odell plan, to accept the surrender of assigned certificates, constitutes an approval by him of the plan. The question of whether he performed his duty does not depend solely upon the letter of November 1, but on that letter considered together with the preceding letters and his general conduct. He had formerly warned the holders to get their information exclusively from him. There had been a substantial change in the situation. As said by the commissioner: "One of the reasons for not taking in claims was enumerated in this memorandum, that I could not give with any degree of accuracy or any degree of fairness toward all concerned an estimate of the value of certificates for surrender purposes in exchange for real estate. Between the dates that you mentioned a material change took place in the affairs of Pacific States. Through the Attorney General's office many of the large claims had been filed and rejected by the Commissioner and were in dispute; legal actions had been filed for collection of those claims and the liability set up in the balance sheet of approximately $4,500,000 had been reduced through the settlement of most of those claims, including some judgments. Therefore, the time arrived when it was possible to estimate the surrender value of the claims in exchange for real estate."

This letter is Report No. 5. It encloses a dividend of 10 per cent bringing the total up to 47½ per cent. It states that on October 15 a hearing was had in court on a bid to purchase the bulk of the assets for 20 million. The commissioner considered the presentation of the bid in the best interests of all creditors but made no recommendation as to its acceptance or rejection. The court denied the bid because it believed that in accordance with the appraisal the court had received the assets were worth $37,113,563. The court also stated that in its opinion every certificate was worth 100 cents on the dollar and that the best return on the assets would be gained by disposing of them separately rather than in bulk. The court announced that 61 separate appeals would be dismissed by Odell and that he would cooperate in the matter of future sales. The commissioner then stated that such action by Odell should permit immediate closing of the sales and remove further delay in the liquidation of the assets. He assured that he was continuing in every possible way to secure the largest and speediest return to all claimants. A condensed statement of financial condition as of August 31, 1945, a profit and loss statement, and a reconciliation of surplus for the period January 1 to August 31 was enclosed. The financial statement showed total assets of $29,585,194.58 and the liabilities at the same figure. A figure of $24,911,406.88 for real estate and other assets, not including cash on hand and accounts receivable, bore the following note: "As at February 28, 1945, this group of assets with a net adjusted book value of $26,071,246.35 was appraised at $37,113,563.30 by experts appointed by the Superior Court in San Francisco." "Accrued Interest on Claims" bears this note: Contingent upon payment in full of all approved claims, interest may be paid to the extent that any available funds will permit." In the profit and loss statement appears the item "Less: Interest on Claims $556,938.00." The statement shows a deficit of $7,116,702.53.

An executive of Wells Fargo Bank testified that on October 18 the commissioner told him for his "private personal ear" that his own carefully checked appraisal showed the assets as 5 million less than the court's appraisal. This would value the assets at in round numbers 32 million dollars as compared to the court's value of 37 million, and the commissioner's statement of values as of August 31, sent in the November 1 letter, of 29½ million. But even his appraisal showed sufficient assets to pay all creditors 100 cents on the dollar, and leave a sum for the payment of some interest. He also said that Odell's plan was feasible, bankable and safe, from the bank's standpoint.

The commissioner made monthly reports to the governor which were released to the press. The commissioner had urged holders to make inquiry concerning the company's affairs. Many inquiries were made by holders in person, by telephone and by letter. On October 29 the commissioner instructed his force to state to anyone making inquiry or asking for advice concerning Auxiliary's proposal to purchase certificates, that the holder should use his own sound judgment, that the commissioner had no part in the purchase and sale of claims. If the holder sold he would forfeit his right to any interest which might thereafter be realized in the liquidation over and above the full amount due on claims. Apparently, inquirers were so advised.

The November 1 letter informed the holders that the court's appraisement was 37 million; there was a note to the effect that the values in the statement were "Carried at legally prescribed values," and there was a definite statement that accrued interest was carried as a liability with a note to the effect that its payment was "Contingent upon payment in full of all approved claims * * *."

Plaintiffs claim that in the letter of November 1 the commissioner omitted various matters which should have been included. In considering these alleged omissions, the purpose of the letter must be borne in mind. Two reports had been made to the holders already that year. Now in addition to sending a dividend, the commissioner desired to report the situation as disclosed in the court hearing on the 20 million dollar bid, and the fact that through the now corporation of Odell there would be no further delay in the making of sales and the liquidation of assets, and to assure the holders that he would endeavor in every possible way to secure for them the largest returns. This letter, following the plan of his previous letters, contained a statement of assets at "legally prescribed values" and showed in comparison with the other reports an increase in assets and a decrease in liabilities. Plaintiffs complain that he did not tell the rate of interest set up on the books, the fact that he would pay such interest as might be determined by the courts, which might even be 7 per cent. All of the letters, including that of November 1, showed plainly that the commissioner intended to pay interest, if the return from the sales of assets warranted it. The amount of that interest would be for further determination. The trustee violated no duty in not stating at that particular time what amount of interest he had in mind. The holders knew when they sold their certificates that they were terminating their right to interest, at whatever rate that interest might be. Had they been concerned with the rate they could have asked the trustee and then it would have been his duty to inform them fully as to his position on the rate of interest.

Plaintiffs contend that he did not tell them that assets of Pacific States were being or to be used in buying claims. This is a rather specious claim based upon the fact that the bids in court for the purchase of a particular piece of property were made on a cash basis, and that when the bid was confirmed, the bidder was asked by Odell to pay in certificates. The bidder's cash, the certificates necessary in amount to equal that cash, which had been purchased by the Robert S. Odell Company on money borrowed from a bank with the certificates pledged as collateral, were all placed in escrow. When the commissioner's deed was received by the escrow holder, the latter would deliver it to the purchaser, the certificates to the commissioner for surrender, the purchase money would then be paid to the bank in payment of the loan with which the certificates had been purchased. To say that the assets of Pacific States were being used to purchase claims is a fallacy. The claims were purchased by the bank loans. All the commissioner was doing was accepting certificates in payment of assets as he had a legal right to do.

Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, cited by plaintiffs, would be in point only were plaintiffs' contention that the commissioner was really buying claims for Auxiliary with Pacific States assets well founded, which it is not. The other authorities cited by plaintiffs deal with situations in which the trustee was dealing with the beneficiary in such manner as to obtain an advantage for himself, and hence do not apply to the situation here.

The commissioner in this letter took what he referred to in letters written to inquirers as a "neutral attitude" as regards the purchase by Auxiliary of certificates. We have been cited to no case which holds where as here he was a trustee as to both certificate holders and stockholders, although the holders had superior rights to the latter, he was required as a matter of law to advise the one as against the other in dealings between themselves or to take other than a neutral position in that respect. His duty was to disclose all necessary facts but not necessarily to advise.

His statement to inquirers that he had no part in the purchase or sale of claims was true, and so found by the court. He had agreed to accept certificates in purchase of property, and that agreement was necessary before the banks would loan Auxiliary money with which to buy certificates. But he was not engaged in the buying or selling of certificates. Without his agreement, the entire Odell plan would fall. However, he was not buying certificates, any more than in the usual case of a commissioner agreeing to accept certificates at face value in the purchase of property.

In view of the fact that the appraisal of the commissioner which he mentioned to the Wells Fargo banker was less than the court's appraisal of 37 million, the fact that in the letter of November 1 the commissioner stated he was "continuing in every possible way to secure the largest and speediest return to all claimants," and in view of the language contained in the previous letters, we cannot say as matter of law that he was withholding information. The situation as to interest is well expressed in the words of the commissioner's tax expert: "In my opinion this right to receive interest is so contingent, not only because of the contingency as to a realization of sufficient money from the liquidation of the assets of the company to provide for a surplus after payment of the principal amount of all obligations, but also because of controversy and doubt as to the proper rate of interest to be paid, that it has no present fair market value. The contribution of this contingent interest right to Pacific States does not result in present income to State Guaranty although as previously indicated it might result in income to State Guaranty Corporation upon ultimate liquidation and dissolution of Pacific States Savings."

To uphold plaintiffs' contention would mean that every time a trustee in reorganization sent out a letter to the creditors he would have to recapitulate all facts theretofore reported by him, together with all estimates and facts within his knowledge, under penalty of being declared to have violated his trust. The commissioner here substantially complied with his obligations. Looking back, it would have been better for him to have set forth in his November 1 letter the matters he set forth in the February 28, 1946 letter, but we cannot hold that he violated his trust for failure to write a particular kind of letter. Plaintiffs cannot deny that they knew that in accepting 100 cents on the dollar they were foreclosing themselves from thereafter obtaining interest, or that the commissioner was claiming that interest would be payable on certificates if the sales of property would bring sufficient returns. The assignments of their claims which the plaintiffs signed stated that the holder was assigning to Auxiliary his certificate "together with all amounts (including interest, if any, which might become legally payable thereon after the principal amounts of all approved claims shall have been paid in full) which may be or become due thereunder * * *."

4. Actions of Auxiliary and Guaranty.

[11, 12] There was no fiduciary relationship between the certificate holders and Pacific States' sole stockholder Auxiliary or Guaranty, even though, after insolvency, they were fellow beneficiaries. Investment certificate holders, by the Building and Loan Act, were not liable for debts or assessments, nor could they participate in profits or dividends. Upon liquidation they must receive payment in full before any payment or distribution could be made to shareholders or stockholders. Plaintiffs cite no case holding that the relationship between the investor and the stockholder in a building and loan association is of a fiduciary nature, and assuming, as contended by plaintiffs, that there was an implied contract between the corporate defendants and plaintiffs that they would do nothing which would wrongfully deprive claimants of their rights, there was no violation of such contract. At all times the Odell group were dealing at arm's length with the certificate holders. They were, at all times, as the certificate holders well knew, attacking the seizure of the company by the commissioner and trying to get its assets back into their possession and control. Time after time the commissioner had warned the holders to beware of them, and even sent the holders certain matters charging the Odell group with mistreating certificate holders during their management of the company.

5. Findings.

Plaintiffs contend that a large number of the findings are not supported by the evidence. As to many of the findings plaintiffs' contention is based upon a different interpretation of the facts than that given by the court. For example, in findings 2 and 3 the court found that plaintiffs and their class did not own claims after they had made the assignments to Auxiliary. As the court held the assignments valid this result necessarily follows. It is not necessary to consider the other findings that are in this class, as we have determined that the facts justified the court in concluding that the assignments were valid and there was no fraud. Again plaintiffs erroneously contend that the commissioner paid for claims through Auxiliary, which they claim was his agent. Findings to the contrary on that and allied subjects were correct.

There were several findings which were not justified by the evidence. However, they would not affect the decision in the case. They are: (1) It was not the intention of the commissioner and other defendants that the claims assigned to Auxiliary were to be delivered to the commissionary for cancellation. That was the purpose of the plan to which the commissioner agreed. (2) That the commissioner did not believe that all claimants would be entitled to interest, if there was an overplus from the sale of assets after paying all claims. The commissioner at all times believed that claimants would be entitled to such interest as the court might allow. (3) The court found that the commissioner told plaintiffs, before the making of the assignments, that he had assets of a value sufficient to enable him in due course of liquidation to pay all creditors in full, plus some interest. Actually the commissioner, as heretofore shown, did not make such a statement. (4) The court found, in effect, that the commissioner determined the rate of interest payable to claimants and the manner of compilation thereof. The commissioner used a certain rate for income purposes only and intended that the rate should be determine by the court, if and when there were assets from which to pay interest.

In view of our decision, it becomes unnecessary to discuss the questions raised by plaintiffs concerning the admissibility of certain evidence.

6. Interest and the April 8, 1946, Agreement.

In view of the fact that by their assignments, plaintiffs parted with all claims against Pacific States, they would not be entitled to interest, no matter what the rate might be, nor could they be concerned with the validity or invalidity of the agreement of April 8, 1946. Hence, it is unnecessary to discuss these matters.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER, J., dissenting.

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94 Cal.App.2d 673

PHILLIPS et al. v. GLAZER.

Civ. 17185.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1949.

Louis Phillips, as trustee under trust recorded March 17, 1941, Book 18274, Page 62 Official Records, Los Angeles County, and Sophie Krieger brought action against Sharon Lynn Glazer to recover damages for slander of title and for an injunction against the publication thereof. The defendant cross-complained for the reasonable value of the use of about five inches of plaintiffs' house and garage which extended over onto defendant's realty.

The Superior Court of Los Angeles County, Stanley Mosk, J., rendered judgment for the plaintiffs, and the defendant appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgment, holding that admission of hearsay evidence to prove a state of mind was proper and that evidence was sufficient to warrant finding that plaintiffs' title had been slandered by defendant.

1. Evidence 🔑317(3)

Hearsay declarations, when used, not to prove the truth of the matter asserted, but to establish the state of mind of the declarant, are not within the hearsay rule.

2. Evidence 🔑314(1)

The hearsay rule does not exclude evidence of a statement when the act of making it is significant irrespective of the truth or falsity of its content.

3. Evidence 🔑317(3)

In action for damages for slander of title and injunction, hearsay testimony that when prospective purchasers of plaintiffs' realty saw sign on defendant's adjoining premises stating that any one buying plaintiffs' realty was buying a lawsuit, they refused to purchase plaintiffs' realty, was properly admitted, not to prove the truth of the declarations, but to prove the state of mind of the prospective purchasers.

4. Libel and slander ⚷130

"Slander of title" is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Slander of Title".

5. Libel and slander ⚷130

Slander of title is an invasion of the interest in the vendibility of property.

6. Libel and slander ⚷131

In order to commit slander of title, actual malice or ill will is unnecessary.

7. Libel and slander ⚷135

Damages caused by slander of title usually consist of loss of a prospective purchaser.

8. Libel and slander ⚷132

A statement, in order to be disparaging and a slander of title, need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property, which throws doubt on its ownership.

9. Adjoining landowners ⚷2

Judgment awarding owner of realty right to lateral support did not give owner any interest in the title to realty of adjoining landowners.

10. Libel and slander ⚷132

Where defendant placed a sign on her garage stating that any one buying adjoining realty of plaintiffs was buying a lawsuit, that any one renting or using plaintiffs' house or garage would be sued for rent, and that title to side wall of plaintiffs' house was clouded, when in fact statement on the sign was untrue, except that five inches of plaintiffs' house and garage extended onto defendant's realty, and plaintiffs freely admitted that fact, and prospective purchasers of plaintiffs' realty were discouraged from purchasing plaintiffs' realty when they saw the sign, there was "slander of title" entitling plaintiffs to damages.

Butts & Grosenbaugh, Downey A. Grosenbaugh, Hollywood, for appellant.

French & Indovina, F. Walter French, Santa Monica, for respondents.

MOORE, Presiding Justice.

From a judgment awarding respondents damages for slander of title and injunction against the publication thereof defendant appeals on (1) asserted errors in admitting certain testimony and (2) insufficiency of the evidence of the slander.

Appellant and respondents are owners of parcels 19 and 20 of Malibu Colony, contiguous properties in Los Angeles county. Prior litigation between them had determined that the common grantor of appellant and respondents had constructed improvements on respondents' property which protruded a few inches onto appellant's lot. The resulting judgment in that action awarded to appellant all such encroaching improvements. Thereafter, appellant attempted personally to remove the portions of respondents' home so awarded her and having failed, employed contractors to complete the task. During respondents' absence, large portions of the wall were removed leaving the interior of the house exposed to the elements and open to transient thieves who removed things of value.

When respondents decided to sell parcel 20 appellant placed a large sign upon her own garage in full view of respondents' premises, reading as follows: "Notice. Anyone buying No. 20 Malibu is buying law suit. Anyone renting or using main house or garage will be sued for rent. Title clouded rt. sides wall, foundation mine. Sign remover will be prosecuted. S. L. G." Prospective purchasers desisted from buying after visiting the premises and seeing appellant's sign. Brokers refused to list the property.

Respondents commenced the instant action for slander of title and to enjoin further removal of the building. Appellant answered and cross-complained for the reasonable value of the use of approximately five inches of the premises awarded to her by the prior judgment.

This appeal presents two questions only: First, did the court improperly admit hearsay testimony? Secondly, was the evidence sufficient to warrant a finding that the title was slandered?

Dr. Louis Phillips, trustee owner of respondents' property, testified that as trustee for his mother he would have conveyed the title of parcel 20 in 1947 had she found a purchaser and requested him to do so; that he discussed a sale with his friend, Dr. Ingleberg and with one Norman Smith; that his discussion with Dr. Ingleberg was in the fall of 1947. "Q. What was said? Mr. Butts: To which we object on the ground that it is hearsay; no proper foundation to show that this defendant was present. The Court: Objection overruled." Dr. Ingleberg said he was interested in purchasing the property at that time. They discussed terms of purchase. Dr. Phillips set the price at $35,000 and the matter was left there pending Dr. Ingleberg's thinking it over. After that they met at different times. On one occasion Dr. Phillips asked him how he felt about going on with the deal. He said he had been passing there and in view of the fact that he was considering purchasing the place he had looked around further; that he saw a sign up which stated that anybody buying the property was buying a lawsuit; that he didn't want to get himself into litigation. "Mr. Butts * * * For the purpose of the record I do move that all the testimony with respect to the conversation held between this witness and the doctor * * * be stricken out on the ground that as to the defendant Glazer it is hearsay. The Court: Objection overruled. Motion denied."

Mr. Smith had been out there with his family on different occasions and with the witness. He expressed an interest in the purchase of the property and the witness told him the price would be $35,000. He was considering it, but when he saw the sign up on one of his return visits he expressed the desire not to get involved in a law suit. He looked at the sign, laughed and said, "What is going on here? I can't go on and make any deal and buy myself a headache."

On cross-examination Dr. Phillips testified that he could not remember specifically what Dr. Ingleberg said except that he was interested in the purchase of the property. With respect to Norman Smith, he said he was interested in the purchase of the property and was considering the matter and would want a little time to think about it. He did not say whether he would be willing to pay $35,000 if he decided to buy.

Respondent Krieger testified substantially as follows: "I had a conversation with David Duncan, a realtor, about the sale of our property before the summer season started in 1948. Mr. Duncan and I were in Art Jones' office in the Malibu Inn property. My wife was not present. I was there to list the property with Mr. Duncan for sale. I asked him whether I might list it with him. He said he did not care to take any listing of the property or try to sell it as long as the sign on the wall of Mrs. Glazer's garage facing the main highway remained there; that he was not in the habit of selling anything to anybody that looks like there is going to be a lawsuit. He said forget about it; he did not care to take a listing until I cleared up the situation."

The witness Barstow testified as follows: "I am a licensed realtor. I had a listing from Mrs. Krieger. I brought a prospective buyer to view parcel 20, Malibu Colony. I asked $35,000 for it. On my second visit with the prospect I noticed the sign on the garage of parcel 19.

"Q. What if anything was said by you and the propective purchaser concerning that sign?

"Mr. Butts: To which we object on the grounds it is hearsay.

"The Court: Objection overruled.

"A. I went into the house and I said to Mrs. Krieger, 'What in the world is this sign doing on the garage?'

"The Court: The question is, what did the purchaser say? A. She said 'What is this sign up here?' and I said, 'Well, I don't know. I will have to ask Mrs. Krieger. I have never seen this before.' The prospect went in with me to see Mrs. Krieger about it. We had some conversation. The prospect did not take the place.

She said she would not be interested in buying the place if there was any question of the title. I said I would have to investigate it thoroughly before I would do anything further with it. She made no objection to the price as being unreasonable.

"Q. Did you as a realtor tell Mrs. Krieger what you were going to do about trying to handle the house, or did you do anything further?

Mr. Butts: I object to the question on two grounds, it is hearsay and calling for a conclusion.

"The Court: Objection overruled on both grounds.

"A. Yes, I went into the house and asked Mrs. Krieger what the sign meant, and she said not to pay very much attention to it. I said nobody would buy a piece of property with that sign standing there because people are not buying property where there is a clouded title. And she said, 'The only thing you can do is wait until I see how this thing is going to work out.' I then discontinued making efforts to sell the place."

[1-3] The rulings indicated in the foregoing resume are assigned as prejudicial. It is contended that the statements ascribed by the witnesses to prospective purchasers was hearsay and incompetent. In the same breath appellant admits it is "an exception to the hearsay rule when the intentions, feelings or mental state of a certain person at a particular time is material to the issues," citing Adkins v. Brett, 184 Cal. 252, 193 P. 251; In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239; Cripe v. Cripe, 170 Cal. 91, 148 P. 520. These authorities establish the rule that such declarations when used not to prove the truth of the matter asserted but to establish the state of mind of the declarant are not within the hearsay rule. That rule does not exclude evidence of a statement when the act of making it is significant irrespective of the truth or falsity of its content. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892; People v. Radley, 68 Cal.App.2d 607, 609, 157 P.2d 426; 10 Cal.Jur., sec. 288, p. 1036. The declarations ascribed by the witnesses in the instant action were not to prove the truth of the declarations but to prove the state of mind of the declarant when he read the sign of appellant. The court's rulings were in the interest of justice. They enabled respondents to show that the presence of the sign caused prospective purchasers to abandon their desires to purchase parcel 20. A contrary ruling would have been grievously erroneous.

[4-8] Appellant next contends that there is not sufficient evidence to warrant a finding that respondents' title had been slandered by appellant. Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. Rest., Torts, sec. 624. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Gudger v. Manton, 21 Cal.2d 537, 543, 134 P.2d 217; Rest. Torts, secs. 624, 625, 628. Damages usually consist of loss of a prospective purchaser. Rest. Torts, sec. 633. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership. Gudger v. Manton, supra.

[9, 10] In the action at bar appellant's sign stated that respondents' title was clouded. This statement was clearly not true since a prior judgment had awarded to respondents all property east of their lot line free and clear of any interest therein on the part of appellant. There was no dispute between the parties as to the ownership of the five inches of improvements extending beyond respondents' property line. Respondents freely admitted that the portions of the house and garage claimed belonged to appellant. Indeed, they could hardly do otherwise in view of the prior judgment to that effect. But such an admission in no way gave appellant any right, title or interest in the property east of the lot line. Having no interest therein appel-

lant could not truthfully assert that its title was clouded. Also, the prior action awarding appellant the right to lateral support did not give appellant any interest in the title to her neighbor's land. Sargent v. Jaegling, 83 Cal.App. 485, 487, 488, 256 P. 1116. The contents of appellant's sign were therefore palpably untrue which fact alone supports a finding of slandered title.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 517

INGRAO et ux. v. KARSTEN et al.

Civ. 17108.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1949.

Charles Ingrao and Catherine L. Ingrao, husband and wife, brought action against Harry Karsten and Florence Karsten, husband and wife, and others, for declaratory relief, to quiet title, for specific performance, and for a restraining order.

The Superior Court of Los Angeles County, Harold B. Landreth, J., rendered a judgment for the plaintiffs, the defendants appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment, holding that Superior Court had jurisdiction of the action, that question of jurisdiction was res judicata, that complaint contained sufficient allegations for declaratory relief, that decree quieting title was proper, that plaintiffs were entitled to specific performance, and that evidence sustained findings.

1. Appeal and error ⚷442

Pendency of appeal from order denying motion to quash writ of execution in prior action, did not deprive superior court of jurisdiction to proceed with action for declaratory judgment concerning judgments in the prior action, and for specific performance of agreement incorporated in those judgments. Code Civ.Proc. § 946.

2. Appeal and error ⚷442

When an appeal is perfected, it stops all further proceedings in the court below on the judgment appealed from or on matters embraced therein, but superior court may proceed with any other matter covered by the action and not affected by the judgment appealed from. Code Civ.Proc. § 946.

3. Judgment ⚷724

Where petition for writ of prohibition to prohibit superior court from signing findings and judgment, was denied by District Court of Appeal, and petition for hearing in Supreme Court was denied, question of jurisdiction of superior court was res judicata in subsequent action involving those findings and judgment.

4. Escrows ⚷9

Plaintiffs were not in default because they failed to pay obligations through escrow as agreed in amended escrow instructions, where they paid such obligations outside of escrow.

5. Declaratory judgment ⚷316

A complaint for declaratory relief is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and a request that such rights and duties be adjudged by the court. Code Civ.Proc. § 1060.

6. Declaratory judgment ⚷316

Complaint alleging that controversy existed between parties relating to their legal rights and duties under agreement and prior judgments which incorporated the agreement and directed that the parties comply with their mutual promises thereunder was sufficient to satisfy requirements of declaratory judgment statute. Code Civ.Proc. § 1060.

7. Specific performance ⚷62

Where defendants failed to comply with their agreement which was incorporated in prior judgments, and no appeal was taken by defendants from such judgments, and those judgments became final, plaintiffs were entitled to specific performance of the agreement.

8. Appeal and error ⚷684(3)

Where there was nothing in record on appeal to indicate that temporary restraining order was ever issued, whether plaintiffs would have been entitled to such an order was a moot question on appeal.

9. Trial ⚷384

Where plaintiffs sustained burden of proof required of them and introduced sufficient evidence to constitute a prima facie case, denial of defendants' motion for nonsuit was proper.

10. Appeal and error ⚷1011(1)

Superior court's findings on conflicting evidence were conclusive on appeal.

A. G. Van Deventer, Pasadena, for appellants.

Leader & Leader and Leonard Wilson, Los Angeles, for respondents.

WILSON, Justice.

This is an action for declaratory relief, to quiet title, for specific performance and for a restraining order. From a judgment in favor of plaintiffs, defendants appeal.

It is defendants' contention that (1) the superior court was without jurisdiction over the action by reason of the pendency of an appeal from an order denying a motion to vacate, recall and quash a writ of execution in a previous case, and that the issues were the same as those in the instant action; (2) the complaint does not state facts sufficient to constitute grounds for the relief sought; (3) the court erred in denying defendants' motions to exclude testimony and to strike all testimony adduced by plaintiffs; (4) the court erred in denying defendants' motion for nonsuit; (5) the evidence does not support the findings.

Since the instant action was tried the appeal from the order denying the motion to quash the writ of execution in the prior action has been determined. Ingrao v. Karsten, 90 Cal.App.2d —, 202 P.2d 616. All the facts relating to the background of the case before us are fully set forth in that opinion, to wit, the dispute between the Ingraos and the Karstens leading to the filing of two actions; the subsequent agreement executed on July 31, 1947, settling their differences; the opening of an escrow pursuant to the agreement and the amendment thereto, and the judgments entered September 2, 1947, incorporating the agreement and directing the parties to perform their promises thereunder and further providing that Catherine Ingrao recover from the defendants $15,000 payable $10,000 on or before September 12, 1947, and $5,000 on or before November 1, 1947.

On October 27, 1947, the defendants in the above cited action having failed to pay the $10,000 as provided in the judgment, it was ordered that execution issue. Defendants thereupon moved to vacate, recall and quash the writ of execution and when their motion was denied, appealed. Ingrao v. Karsten, supra. While the appeal was pending plaintiffs filed the instant action on August 4, 1948.

It is alleged in the complaint that the agreement and judgments in the previous actions provide that Catherine Ingrao at her election might pay two obligations, one in the amount of $15,800, which was an encumbrance against the so-called Venetian Dining Room property, and the other in the sum of $19,000 which was secured by collateral in the form of securities belonging solely to Catherine Ingrao; that in the event she did pay those obligations the agreement and judgments provide that defendant Florence Karsten should execute her note or notes in the total amount of $34,800 secured by appropriate first trust deeds covering the Venetian Dining Room property; that the two obligations referred to were paid and satisfied by Catherine Ingrao but that defendant Florence Karsten has refused to execute the notes although demand has been made upon her; that on October 16, 1947, contrary to the provisions of the agreement and the judgments Florence Karsten executed a trust deed note in the amount of $26,000 to her mother, defendant Montana, the trust deed conveying the Venetian Dining Room property; that no consideration was paid by the beneficiary Montana and the deed was executed in order to defraud plaintiff Catherine Ingrao and to make it impossible for Florence Karsten to execute a first trust deed to Catherine Ingrao; that it was agreed between Florence Karsten and her mother that no payments would be made on the trust deed note so that Mrs. Montana might declare a default; that no payments were made on the note whereupon Mrs. Montana gave notice to the trustee under the deed of trust of her election to sell and foreclose. Before the trustee's sale took place the complaint in the instant action was filed.

[1, 2] Defendants' contention that the trial court did not have jurisdiction to proceed in the matter before it because of the pendency of an appeal in the action involving the writ of execution is without merit. When an appeal is perfected it stops all further proceedings in the court below upon the judgment appealed from or upon matters embraced therein. However, the superior court may proceed upon any other matter covered by the action and not affected by the order appealed from. Code Civ.Proc., sec. 946; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 33, 99 P. 359, 17 Ann.Cas. 933.

The appeal in question arose out of the superior court actions in which the judgments had become final. The only questions before the appellate court were (1) whether there was a material difference between certain of the terms of the agreement of July 31, 1947, and the subsequent judgments which incorporated the agreement, and (2) whether the obligation of the Karstens to pay the remaining sum of $15,000 to the Ingraos was in any way dependent upon the latters' paying or refinancing the two obligations for $15,800 and $19,000 respectively. Both of these questions have been determined adversely to defendants by Division One of this court.

[3] It is obvious that the issues involved in the instant case are not the same as those in the action then on appeal, nor are they affected by the order appealed from. Moreover, plaintiffs in their brief have cited the Petition for Writ of Prohibition in Civil No. 16786, filed in this court by defendants at the conclusion of the trial of this case, by which they sought to prohibit the trial court from signing the findings and the judgment. In their petition defendants set forth in substance the allegations of the complaint and the answer and the proceedings in the trial court. The ground upon which defendants based their petition was the same as that now being urged, namely: That the superior court was without jurisdiction to hear the matter. The petition for a writ of prohibition was denied by this court on October 27, 1948, and defendants' petition for a hearing in the Supreme Court was denied on December 23, 1948. The question of the jurisdiction of the superior court in this matter is, therefore, res judicata.

[4] Defendants contend that plaintiffs were in default because they had failed to pay the two obligations through the escrow as agreed in the amended escrow instructions. Whether they were paid through escrow or outside of escrow is immaterial. The Karstens were obligated to pay or refinance the $19,000 loan and the Venetian Dining Room property (which under the terms of the agreement of July 31, 1947, and the judgments incorporating that agreement was conveyed to Florence Karsten) was subject to a first trust deed in the amount of $15,800. Catherine Ingrao had the option of paying or refinancing both obligations in which event the Karstens agreed to execute a note secured by a first trust deed on the Venetian Dining Room property. Thus the Karstens were required either to pay the obligations themselves or to reimburse Catherine Ingrao in the event she paid them. Catherine Ingrao elected to pay both obligations and upon such payment was entitled to the trust deed note as provided in the agreement and the judgments. The Karstens were in no worse position because they were paid outside of escrow. Their liability remained the same.

[5, 6] Defendants' next ground of objection that the complaint does not state a cause of action and that the court therefore erred in denying their motion for a

nonsuit and their motion to exclude testimony is also untenable. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Code Civ.Proc., sec. 1060; Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062, and cases cited. The complaint alleges that a controversy exists between the parties relating to their legal rights and duties under the agreement of July 31, 1947, and the judgments which incorporated the agreement and directed that the parties comply with their mutual promises thereunder. The allegations are sufficient to satisfy the requirements of the statute.

Plaintiffs' second cause of action is one to quiet title. It is alleged in the complaint that under the agreement of July 31, 1947, and the judgments incorporating the agreement title to certain real property is in plaintiffs but that defendants have refused to execute deeds as agreed and as directed by the judgments. Plaintiffs contend this action deals primarily with three parcels of property designated as A, B, and C, although they also allege in their complaint that Catherine Ingrao is by virtue of a sheriff's sale the owner of and entitled to possession of the Venetian Dining Room property. Defendants by their answer as amended admit they have no interest in parcels A, B, and C. Their argument as to the sufficiency of the cause of action is directed solely to the Venetian Dining Room property. The prayer in the complaint seeks only a decree quieting title to the three parcels and the findings and judgment with respect to defendants' right, title and interest is limited to parcels A, B, and C.

[7] Plaintiffs by their third cause of action seek a decree ordering the Karstens to execute and deliver to plaintiffs their note in the amount of $34,800 secured by a first deed of trust on the Venetian Dining Room property. Defendants having failed to comply with the terms of their agreement and the decree, the action was properly brought and the allegations in the complaint are sufficient. Defendants' argument that plaintiffs by their action are seeking to compel in a separate action "the performance of the terms of a judgment of a sister court, of co-equal jurisdiction at a time when an appeal was alleged to be pending" is fallacious. There was no appeal from the judgments incorporating the agreement of the parties which plaintiffs seek to enforce specifically and those judgments are final. Furthermore, the issues involved in the instant action are not the same as those in the action which was then on appeal, and would not be affected by a determination thereof.

[8] Whether or not plaintiffs would have been entitled to a temporary restraining order is a moot question since there is nothing in the record to indicate that such an order was ever issued.

Defendants' contention that the court erred in overruling their objection to the introduction of evidence is untenable in view of the conclusions reached, as above stated, that (1) the court had jurisdiction to hear the matter, and (2) the complaint states facts sufficient to constitute grounds for the relief sought.

[9] Defendants urge that the trial court erred in denying their motion for a nonsuit. However, a review of the record discloses that plaintiffs sustained the burden of proof required of them and introduced sufficient evidence to constitute a prima facie case.

Defendants' motion to strike all the evidence introduced on the part of plaintiffs at the conclusion of the trial was upon the same grounds raised in their objection to the introduction of evidence, namely: Lack of jurisdiction and that the declaratory relief sought was not the proper remedy. For the reasons hereinabove stated the argument is without merit.

[10] Defendants' final contention is that the findings are not supported by the evidence. The majority of the findings of which defendants complain are of facts upon which the evidence is conflicting. It is

settled law that where a conflict in the evidence exists the findings of the trial court are conclusive. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756 and cases cited. There is substantial evidence to support the findings that Florence Montana paid inadequate consideration for the deed of trust; that such deed was executed and given by Florence Karsten wrongfully and without right so that she would be unable to comply with the terms and conditions of the agreement of July 31, 1947, and the provisions and orders of the judgments incorporating that agreement; that Florence Montana and Florence Karsten conspired to defraud plaintiff Catherine Ingrao; that Catherine Ingrao paid the two obligations in the amount of $15,800 and $19,000; that defendant Florence Karsten had refused after demand to execute her note in the amount of $34,800 or to fulfill her promises contained in the agreement or to comply with the terms and orders of the superior court; that the judgments were in conformity with the agreement.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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94 Cal.App.2d 688

ROSE v. ORANGE COUNTY.

Civ. No. 3872.

District Court of Appeal, Fourth District, California.

Nov. 17, 1949.

Action by Marilyn Rose against County of Orange, a political subdivision of the State of California, for injuries sustained when automobile driven by plaintiff's husband proceeded in a fog from county road across state highway into open drainage ditch on opposite side thereof.

The Superior Court of Orange County, Raymond Thompson, J., entered judgment on a verdict in favor of plaintiff and an order denying defendant's motion for judgment notwithstanding the verdict and defendant appealed.

The District Court of Appeal, Barnard, P. J., held that whether county owed a duty to users of county road to give some warning of dangerous condition at intersection, whether adequate warning was given, and whether driver of automobile was contributorily negligent were questions of fact for jury and affirmed the judgment and order.

1. Municipal corporations 🔑762(1)

A county or public agency has a duty to warn persons lawfully using its streets of a dangerous condition which exists, even if the condition was not created by it or consists of something not within its control.

2. Automobiles 🔑308(6)

Whether county owed a duty to users of county road, which intersected but did not cross state highway, to give some warning of dangerous condition which existed by reason of open drainage ditch on opposite side of state highway, whether any such warning was given and whether an ordinary stop sign, if sign was in place, was a sufficient warning under the circumstances were questions of fact for jury. St.1923, p. 675, § 2.

3. Automobiles 🔑308(7)

Whether stop sign at "T" intersection of county road with state highway had been down a sufficient length of time to impute to county constructive knowledge of such fact was a question of fact for jury in action against county for injuries sustained by occupant of automobile which, in fog, proceeded from county road across state highway into open drainage ditch on opposite side thereof. St.1923, p. 675, § 2.

4. Automobiles 🔑308(11)

Whether motorist, who was familiar with dangerous condition existing at "T" intersection of county road with state highway by reason of open drainage ditch on opposite side of highway and who knew that highway was protected by stop signs, was contributorily negligent in proceeding in fog from county road across state highway into drainage ditch, so as to preclude recovery against county for injury sustained by driver's wife was a question of fact for jury. St.1923, p. 675, § 2.

5. Appeal and error ⚿**1001(1)**

Where trial judge did not grant a new trial, though the record indicated he should have done so, appellate court was bound as to questions of fact by jury's findings supported by evidence.

6. Automobiles ⚿**309(1)**

In action against county for injuries sustained when automobile proceeded, in fog, from county road across state highway into open drainage ditch on opposite side thereof, instructions as to duty of city or county to warn persons lawfully using streets of a dangerous condition even if condition was not created by city or county and was beyond its control were not erroneous as being inapplicable to the facts. St.1923, p. 675, § 2.

◆

Forgy, Reinhaus & Forgy, Santa Ana, for appellant.

Joseph Scott, Los Angeles, Drumm & Drumm, Santa Ana, J. Howard Ziemann, John R. Kent, Los Angeles, for respondent.

BARNARD, Presiding Justice.

In this action for damages, arising from an automobile accident, the defendant county appeals from a judgment in favor of the plaintiff and also from an order denying its motion for a judgment notwithstanding the verdict of the jury.

The accident happened in the community of Westminster at the "T" intersection of 13th Street , a county road, with Huntington Beach Boulevard, a through state highway. The highway runs north and south, having an 18-foot concrete pavement with a white line in the center, and oiled shoulders on either side. An open ditch runs along the east side of this highway. The evidence is conflicting as to the distance between the east edge of the pavement and the beginning of the slope of the ditch. Two witnesses for the respondent testified that this distance was about a foot while a state highway patrolman testified that it was approximately 10 feet. 13th Street comes in from the west, dead-ending there, and does not cross the highway or the ditch. It is approximately 30 feet wide and has an oiled surface. For years a stop sign had stood on 13th Street where it entered the highway. Two witnesses testified that this stop sign had been laying on the ground for about a week before the accident, while a highway patrolman, who arrived thirty-five minutes after the accident occurred, testified that it was then in place.

The respondent and her husband lived about a mile from this intersection, in the house in which he was born. Shortly before 7:00 o'clock on the evening of December 14, 1946, they left home to go to Santa Ana, the husband driving the automobile. Respondent and her husband occupied the front seat and two young men sat in the rear seat. It was an extremely foggy night and very difficult to see even fifteen feet ahead of the automobile. However, they successfully turned five corners within about a mile, and then stopped to pick up a young lady who lived on 13th Street, about two blocks west of this intersection. She got into the rear seat of the automobile and respondent's husband drove on easterly toward this intersection. He testified that he traveled ten to fifteen miles per hour; that "We were all trying to peek out and see where we were at"; that he did not see any stop sign at the entrance to the highway although he knew that there had been one there as long as he could remember; that he did not see any white lines on the pavement; and that "I knew we were coming close to Huntington Beach Boulevard, but I didn't have any warning." He drove on across the highway and into the drainage ditch east of the highway, his wife being thrown against the windshield and receiving the injuries in question.

[1, 2] The appellant first contends that the evidence is not sufficient to support the verdict since there is no evidence of any dangerous or defective condition on 13th Street itself, within the meaning of the Public Liability Act, St.1923, p. 675, § 2, under which this action was brought. It is argued that the evidence discloses no

ditch or other hazardous condition within the actual confines of 13th Street; that any dangerous condition appeared only after a traveler had left 13th Street and entered the state highway; that any duty with respect to remedying such a condition or giving warning thereof rested on the state of California; that the duty of the county did not extend beyond the boundaries of 13th Street; and that the respondent county may not be held responsible for a dangerous and defective condition which thus existed on a state highway. Not only does the general situation involve questions of fact, but it is rather well established that such a county or public agency has a duty to warn persons lawfully using its streets of a dangerous condition which exists, even if that condition was not created by it or consisted of something which was not within its control. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Rippe v. City of Los Angeles, 50 Cal. App.2d 189, 123 P.2d 47. It cannot be held as a matter of law that no duty rested on the appellant to give some warning of the condition which here existed. Whether any warning was here given and whether an ordinary stop sign, if it was there, was sufficient under the circumstances presented questions of fact rather than of law.

[3] It is next contended that if any duty rested on the appellant, to give a warning of this dangerous condition which was outside of 13th Street, it should be held as a matter of law that the stop sign which had been erected at this intersection was adequate for this purpose; that it was not shown that any responsible official of the county had actual notice that the sign was down; and that the evidence is not sufficient to impute constructive knowledge of such fact. There was evidence that this stop sign was down for a week, and possibly more, before the accident; that meetings had been held to protest the dangerous situation caused by this ditch; that this matter had been called to the attention of the supervisor of that district; that the supervisor and the road foreman were familiar with the conditions along this main highway; and that one or both of them was frequently there. Factual questions appear and it cannot be held, as a matter of law, that the conditions and length of time involved were not sufficient to put the responsible officials upon inquiry.

[4, 5] In this connection it is argued that the purpose of such a stop sign is to give warning in such a case as this, and that this purpose was adequately accomplished since the driver of this car had lived in this vicinity most of his life, knew that this was a state highway protected by stop signs, knew of the existence of the ditch, knew of the fog condition, and knew that he was near the intersection. From a factual standpoint this argument is very persuasive. The driver of this car not only was thoroughly familiar with this intersection and its surroundings but, under fog conditions which the witnesses testified remained the same, he had successfully located five other street intersections and made five successive turns within about a mile. However, while moving very slowly during the last two blocks, after picking up the other young lady, and knowing that he was "coming close to Huntington Beach Boulevard," he was, according to his testimony, unable to see the house or the white picket fence which were near the intersection, and was unable to see the different pavement on the highway or to see the white line along its center. If he did not see these things as he entered the highway it seems improbable that he would have observed any warning signs which the appellant might reasonably be expected to have provided. As a practical matter, it would reasonably seem that his attention must have been diverted by something other than the fog, a condition which had not been sufficient to prevent his seeing and making the turns onto several streets immediately theretofore. While this situation seems probable, some of the evidence and a part of the inferences are to the contrary, factual questions appear, and it cannot be held as a matter of law either that an adequate warning was provided or that he was guilty of contributory negligence. This is a case where the trial judge might well have, and the record indicates that he should have, granted a new trial. Not having done so, this court is bound by

the familiar rules governing questions of fact.

It is further contended that two instructions given were prejudicial. These instructions read as follows:

"Ordinarily, a dangerous or defective condition of a street, heretofore defined by me, must be situated within the street itself. There may be, however, situations where the source of danger, although situated outside the street, is of itself so direct a menace to travel within the street, that the failure to employ available protective or remedial measures will be regarded as a lack of reasonable repair or reasonable care for the safety of travelers along said street."

"It is the duty of a city or county to warn persons lawfully using one of its streets that a dangerous condition exists, even if that condition was not created by the city or county and is beyond its control."

[6] It is contended that these instructions were inapplicable to the facts in this case, rather than that they are incorrect statements of the law. As hereinbefore stated, a duty rested upon the appellant to give some warning of the dangerous condition which here existed. These rules of law had a material bearing on the questions of fact which were necessarily submitted to the jury. Neither error nor prejudice appears in this connection.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

34 Cal.2d 431

ODONE v. MARZOCCHI.

S. F. 17674.

Supreme Court of California, in Bank.

Nov. 15, 1949.

Rehearing Denied Dec. 15, 1949.

See 212 P.2d 233.

Action by Giacomo Odone against Peter Marzocchi to recover certain money and realty transferred by plaintiff's wife shortly before her death to defendant.

A Superior Court, City and County of San Francisco, Edward P. Murphy, J., entered judgment for the plaintiff and the defendant appealed.

The Supreme Court, Carter, J., held, inter alia, that the realty was the separate estate of the wife and she could convey it without her husband's consent and reversed the judgment with instructions.

Prior opinion, 200 P.2d 180.

1. Husband and wife 🔑262(1)

Statutory presumption that any property acquired by a married woman by an instrument in writing is her own separate property, is a rebuttable presumption. Civ. Code, § 164.

2. Husband and wife 🔑262(1)

Where wife purchased realty with combined earnings of parties, taking title as recited in deed as her separate property and 11 days thereafter husband executed a quitclaim deed to wife, in absence of evidence to contrary, quitclaim deed would be taken as evidence of husband's intention to convey to wife any interest which husband had in property to wife as her separate estate and court would be bound to find in accordance with such presumption. Civ.Code, § 164.

3. Husband and wife 🔑266

A husband and wife may agree between themselves that the status of community property be changed so as to become the separate property of either of them, or the husband may make a gift of his share of the community to his wife. Civ.Code, § 162.

4. Husband and wife 🔑266

Where wife, with money saved from combined earnings of herself and her husband, purchased realty, and a deed was made out to wife reciting that she took title thereto as her separate property, and thereafter husband executed a quitclaim deed to wife, quitclaim deed executed by husband and unexplained by him showed intent on husband's part that property was to be separate estate of wife and conclusively established that wife owned realty as her separate estate and she could convey it without husband's consent. Civ. Code, §§ 162, 164.

5. Deeds 🔑15, 17(2)

Neither consideration nor adequacy of consideration is essential to the validity of a deed. Civ.Code, § 1040.

6. Husband and wife 🔑190

Where wife, who held title to realty in her own name as her separate property, executed and delivered deed to third party, deed passed title. Civ.Code, §§ 162, 1040.

7. Gifts 🔑53

Where wife before she went to hospital gave funds to a friend and 12 days later she signed a written instrument which stated that she made a gift, in case of death, to friend of such money, and that if she should recover her health, friend should return money to her, there was a "gift causa mortis". Civ.Code, § 1149.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Gift Causa Mortis".

8. Husband and wife 🔑259, 273(1)

Where wife made a gift causa mortis of funds derived from earnings of both husband and wife, and there was no evidence that husband made a gift of any part of funds to wife, funds constituted community property and on wife's death gift was valid as to half of the funds. Civ.Code, §§ 161a, 162–164, 172, 1149, 1150; Probate Code, § 201.

9. Husband and wife 🔑273(12)

In action to recover money and realty transferred by plaintiff's wife shortly before her death to defendant, on ground that such property was community property, evidence was insufficient to sustain finding that defendant was entitled to a credit of $1,800 which was to be deducted from money intrusted to defendant by plaintiff's wife to cover various expenditures made by defendant for wife's medical and funeral expenses and for improvements made by defendant on wife's realty.

10. Husband and wife ⚷273(12)

In action to recover money and realty transferred by plaintiff's wife, shortly before her death, to defendant, on ground that such property was community property, evidence sustained finding that defendant received $5,400 from plaintiff's wife rather than only $5,000 as contended by defendant.

11. Husband and wife ⚷273(1)

A gift inter vivos or causa mortis by a husband or wife of community property, without the other's consent, if not set aside during the giver's lifetime, at the death of the giver becomes valid as to one-half the gift. Civ.Code, § 161a; Probate Code, § 201.

12. Husband and wife ⚷19(16)

Under statute providing that husband is liable for "necessaries of life" furnished to wife while parties are living together, medical expenses incurred during last illness and funeral expenses are within quoted words. Civ.Code, § 174.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Necessaries of Life".

13. Husband and wife ⚷273(1, 4)

Where wife made a gift causa mortis of community funds to a friend with understanding that friend was to pay wife's medical and funeral expenses, gift was valid only as to one-half of funds, and medical and funeral expenses paid by friend were chargeable against entire fund rather than against husband's half of the funds. Probate Code, §§ 201, 202; Civ.Code, § 161a.

14. Pleading ⚷129(2)

Where plaintiff failed to answer allegations of cross-complaint that reasonable rental value of realty conveyed to cross-complainant by plaintiff's deceased wife was $25 per month, allegation would be taken as true. Code Civ.Proc. §§ 442, 462.

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McCarthy & Rowell, Redwood City, for appellant.

Albert Picard, Alfred E. Graziani, San Francisco, for respondent.

CARTER, Justice.

Respondent husband brought this action to recover certain real and personal property transferred by his wife shortly before her death to appellant.

Respondent, Giacomo Odone, and the decedent, Maria Odone, were married in France in 1928, and came to San Francisco where they lived until Maria's death in January, 1946. The record does not show that either of the parties had any separate property at the time of the marriage or that either of them acquired any during the marriage except as hereinafter set forth.

In July, 1944, Maria purchased for $1,300 a piece of improved real estate in San Francisco, taking title, as recited in the deed, as her separate property. Eleven days thereafter, her husband, the respondent, executed a quitclaim deed of this property to her. Both deeds were recorded on August 2, 1944. It appears that this property was purchased with the combined earnings of Maria and Giacomo Odone.

Appellant, Peter Marzocchi, had known Odone before his marriage to Maria, and after the marriage was a friend to both husband and wife, and was, at times, the employer of Odone. Maria, who had evidently come to dislike and distrust her husband, placed more and more confidence in Marzocchi and consulted with him about buying the property in question. It seems that Marzocchi assisted the couple in various matters since both Maria and her husband spoke Italian and had difficulty with the English language. Marzocchi testified that he went with Maria to the title company to help her complete her plans to purchase the real property. After her purchase of the house and lot, Marzocchi did a great deal of work in repairing it and in building an additional room thereon. He testified that he had expended $1,500 of his own funds on the house, and that his labor was worth $500.

In November of 1945, Maria became seriously ill and it was necessary for her to be hospitalized, and Marzocchi made all the necessary arrangements for her care. Several times before she became ill, Maria and Marzocchi had discussed different ways in which she could repay him for his labor and the money he had expended. (There is a deed in evidence, dated August 6, 1945, signed by Maria, granting to Marzocchi an undivided one-half interest in the property, but the evidence does not show that this deed was ever delivered to him.) On November 26, 1945, before she became hospitalized, but after the onset of her illness, Maria executed a deed to Marzocchi granting him the property in question for a recited consideration of $1,800. This deed was recorded December 15, 1945. On the same day, appellant signed and acknowledged a deed reconveying the property to her with the understanding that the deed would be delivered to their attorney and delivered by him to Maria if appellant should predecease her. This deed was never delivered to either the attorney or Maria, nor was it recorded.

With respect to the real property, the trial court found that respondent was the owner and entitled to possession; that Maria had no title or interest and no power to convey any interest therein; that the property was owned by respondent and Maria Odone; that the deed from Maria to appellant was void and must be canceled and appellant required to execute, acknowledge and deliver to respondent a deed conveying all right, title and interest in the property. These findings are inconsistent in themselves in that the court finds the property to be owned by respondent and Maria, and yet finds that Maria had no title or interest or power to execute any conveyance. The finding that respondent was the owner, or that he owned the property with Maria, his deceased wife, is not supported by the record.

[1, 2] The deed to Maria recites that the property is conveyed to her as her separate estate. Section 164 of the Civil Code provides that whenever any property is acquired by a married woman by an instrument in writing, it is presumed to be her separate property. Although this is a rebuttable presumption, respondent made no effort to explain his quitclaim deed of July 14, 1944. All presumptions being in favor of conveyances to the wife, therefore, in the absence of any evidence to the contrary, the quitclaim deed to decedent must be taken as evidencing the intention which it imports—a conveyance of any interest which respondent had in the property to her as her separate estate, and the court is bound to find in accordance with the presumption. Freer v. Wells Fargo Bank & Union Trust Co., 75 Cal.App.2d 150, 170 P.2d 491; Rhea v. Thompson, 115 Cal.App. 466, 1 P.2d 1091; Dale v. Dale, 87 Cal.App. 359, 262 P. 339.

[3, 4] Although the property was undoubtedly purchased with the community funds of the parties, a husband and wife may agree between themselves that the status of such property may be changed so as to become the separate property of either of them, or the husband may make a gift of his share of the community to his wife. It would appear that the quitclaim deed, executed by respondent and otherwise unexplained by him, would show a sufficient intent on his part that the property was to be the separate estate of his wife. There is no other evidence bearing on the question, and under these circumstances, it would seem conclusively established that decedent owned the real property as her separate estate which she could, of course, convey to a third person without the consent of her husband, the respondent. Civil Code, sec. 162.

[5, 6] Respondent contends that it is immaterial whether the character of the property is considered to be community or the separate estate of the deceased wife inasmuch as it was conveyed by decedent to appellant merely for security purposes—to insure the payment of appellant's services in repairing the house, and the repayment of the money expended by him. Appellant testified that his labor, and the money expended by him, amounted to about $2,000. He testified that Mrs. Odone asked him to have the deed prepared and insisted upon the insertion therein of the statement as to the consideration of $1,800. His testimony as to the reasons for her insistence is confusing. He said that she wanted to "give" him the property because he had put a great deal of time and money into it; that she wanted him to be protected in the event that she died; that she "just wanted to do it that way". He also testified that

in November, 1945, when Mrs. Odone became ill, she wanted to sell him the property and that "the last understanding was that she decided to sell me the house because she found out I had done so much work in the house that it was worth it; she sold me the house for all what I done". It would seem reasonable to conclude from this that Mrs. Odone either intended to give him the property because he had expended so much in repairing it, or that she intended to sell it to him for his past services which she valued at $1,800. Either conclusion is consistent with her intent, as evidenced by her deed, to pass title to appellant. Neither consideration, nor adequacy of consideration, is essential to the validity of a deed. Civ.Code, sec. 1040; Abelein v. Pepper, 8 Cal.2d 25, 63 P.2d 817; Graner v. Hogsett, 84 Cal.App.2d 657, 191 P.2d 497; Cambridge Co. v. Moore, 62 Cal. App.2d 134, 144 P.2d 57. The deed was delivered to and accepted by appellant, and it follows that if she intended to give him the property, her deed would pass title; or, if she intended to sell it to him for his past services, this also would be a sufficient consideration (if any were needed) to pass title to appellant. Bradley v. Butchart, 217 Cal. 731, 741, 20 P.2d 693; Davies v. Symmes, 49 Cal.App.2d 433, 122 P.2d 102; Chichester v. Mason, 43 Cal.App.2d 577, 111 P.2d 362.

[7] The facts with respect to the personal property are as follows: Just before going to the hospital on December 16, 1945, Maria handed appellant a package of currency which she told him amounted to $5,400. He testified that she told him that she wanted him to use it to pay her bills and to do all that he would for her, and if she did not die, he was to return the balance to her, but if she should die, he was to keep it for himself. Twelve days later, while in the hospital, Maria signed an instrument, written both in English and Italian, which reads as follows: "December, 28, 1945, I, Mary Odone, declare that I have made a gift, in case of my death, to my friend, Peter Marzocchi, of Fifty Four Hundred Dollars ($5400.00) in cash which I want him to have for his own in case I should die. If I recover my health, he will return it to me. Maria Odone". Maria died eight days after signing this instrument.

The Civil Code, section 1149, provides that a gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver. Section 1150, Civil Code, provides that "a gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death." The essential elements of such a gift are present here. The gift was made with a view to the donor's death; the donor died of the illness which she feared; there was an actual delivery to the donee, and acceptance by him, all of which transpired within the life of the donor. Braun v. Brown, 14 Cal.2d 346, 94 P.2d 348, 127 A.L.R. 773; Yates v. Dundas, 80 Cal. App.2d 468, 182 P.2d 305; Barham v. Khoury, 78 Cal.App.2d 204, 177 P.2d 579. In the last cited case, the Court said that the execution of a writing does not enhance the validity of a gift causa mortis. Its only advantage is to contribute to certainty in the proofs. Such language merely repeats the legal implication and emphasizes that a gift causa mortis was intended. (See cases cited there.)

[8] The funds handed to appellant by Maria were admittedly derived from the earnings of both husband and wife and therefore constitute community property since there is no evidence that the husband made a gift of any part of them to the deceased wife.

[9] The trial court found that appellant was indebted to respondent in the sum of $5,400, but that respondent was entitled to credit for the sum of $1,800 to cover various expenditures made by him "in and about the funeral and burial of Maria Odone, the deceased wife of said plaintiff, and in and about certain real property owned by said plaintiff and said Maria Odone * * *" The amount found by the trial court to be due as a credit to appellant cannot be sustained under any view of the evidence. Appellant contends that the trial court erred in finding that he received $5,400 from Maria and contends that

he received but $5,000; that the money received by him constituted her separate property and that he should be entitled to the whole thereof, minus certain expenses, as a gift causa mortis, or to one-half thereof if the money constituted community funds of the deceased and respondent. If the money constituted community funds, appellant contends that the expenses of the last illness and funeral should be charged against the half to which decedent had no testamentary power.

[10] The evidence is sufficient to support the finding of the trial court as to the amount of money which appellant received from Maria, as there was received in evidence on behalf of appellant a written instrument signed by Maria in which she declared that she had made a gift to appellant of the sum of $5,400. Appellant's contention that the funds were the separate property of Maria cannot be sustained since the funds were admittedly derived from the earnings of both husband and wife during marriage and therefore constituted community property. Civil Code, secs. 162, 163, 164.

Appellant's contention that the delivery to him of the $5,400 was a gift causa mortis is meritorious since the essential elements of such a gift were present. Respondent, on the other hand, maintains that Section 172 of the Civil Code renders the wife's gift invalid because it is there specifically provided that the husband has the management and control of community personal property, with like absolute power of disposition, other than testamentary, that he has his separate estate.

Section 201 of the Probate Code provides that "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

[11] It has been settled in this state that a gift made inter vivos by the husband to a third person of community property without the wife's consent is valid as to one-half thereof at his death, although the wife, during her husband's lifetime may set it aside in toto; Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221; Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629; Lynn v. Herman, 72 Cal.App.2d 614, 165 P.2d 54, and that the husband may make a gift to a third person to take effect upon his death of one-half of the community funds. Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, 108 P.2d 405; Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482; In re Estate of McNutt, 36 Cal.App.2d 542, 98 P.2d 253; Mazman v. Brown, 12 Cal. App.2d 272, 55 P.2d 539.

The respective interests of the husband and wife in community property during the continuance of the marriage relation are declared by the Civil Code, sec. 161a, to be present, existing and equal interests, although the management and control of the community is entrusted to the husband. It would seem to follow that by virtue of this provision, and that of the Probate Code, sec. 201, providing for testamentary disposition by either spouse of one-half of the community funds, that the wife also may make a gift of her share to take effect upon her death. Such a gift may be regarded as the equivalent of a provision by will, for it is, in its nature, testamentary. Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 254 P. 306; Britton v. Hammel, 4 Cal.2d 690, 52 P.2d 221; IV Page on Wills (Lifetime Ed., p. 744). It would appear to follow therefore that, in such a case, the wife would be entitled to make a gift causa mortis of one-half of the community funds without the husband's consent. Such a gift, by analogy to one made by the husband, would be voidable by him as to the whole thereof during her lifetime, but upon her death may be avoided by him as to one-half only.

The remaining question to be decided with respect to the personal property is the source of payment of the expenses of the deceased wife's last illness and funeral. The undisputed evidence shows these expenses to be $1,574.17.

[12–14] Section 202 of the Probate Code provides in part that "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; * * *." The husband is liable for the necessaries of life furnished to the wife while the parties are living together. Civ.Code, sec. 174. Medical expenses incurred during the last illness, and the funeral expenses, are such necessaries. In re Estate of Weringer, 100 Cal. 345, 34 P. 825; Evans v. Noonan, 20 Cal.App. 288, 128 P. 794; Riley v. Robbins, 1 Cal.2d 285, 34 P.2d 715; Medros v. Kohn, 68 Cal.App. 367, 229 P. 873; Davis v. Fyfe, 107 Cal.App. 281, 290 P. 468. If these expenses are a debt of the husband, and the community property is liable for his debts, Nichols v. Mitchell, 32 Cal.2d 598, 610, 197 P.2d 550; Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641, it would seem that, under the Probate Code, section 202, the expenses should be paid from the sum of $5,400, and the net balance divided equally between appellant and respondent. In Re Estate of Coffee, 19 Cal.2d 248, 252, 120 P.2d 661, 664, this Court, in construing section 202, Probate Code, said that "* * * the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration * * *." See, In re Estate of Atwell, 85 Cal.App.2d 454, 193 P.2d 519; In re Estate of Marinos, 39 Cal.App.2d 1, 102 P.2d 443. In the Coffee case, the husband predeceased the wife so the reverse situation is presented. This would, however, seem to make no difference in the result to be reached. The community property, in the amount of $5,400 received by appellant, being liable for the husband's debts, should be charged with the expenses here involved. In this connection, it must be noted that appellant has paid, from the funds received by him, all expenses of Mrs. Odone's last illness and funeral, and must be credited with one-half thereof when he receives his share of the balance, or, in other words, the amount of these expenses must be deducted from the $5,400, and the balance divided equally between appellant and respondent.

Appellant, Peter Marzocchi, in his cross-complaint, alleged that the reasonable rental value of the real property was $20 per month and prayed for that amount from the time of the death of Maria until possession should be delivered to him. This cross-complaint was not answered by respondent, Giacomo Odone, and must therefore be taken as true. The trial court found "That none of the allegations contained in the first amendment to answer and cross-complaint or in the cross-complaint on file herein is true." This finding is in conflict with section 442 of the Code of Civil Procedure which provides, in part, as follows: "* * * The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. * * *" Section 462 of the Code of Civil Procedure provides that "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; * * *." The parties affected by a cross-complaint may demur or answer thereto as to the original complaint. If they do not plead thereto, they admit the facts alleged. 21 Cal.Jur., Sec. 56, p. 88, and cases there cited.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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34 Cal.2d 442

HANNULA v. HACIENDA HOMES, Inc.

S. F. 17747.

Supreme Court of California, in Bank.

Nov. 15, 1949.

Margery Livingston Hannula brought an action against Hacienda Homes, Inc., for a declaratory judgment determining her right to build a dwelling house on certain realty.

The Superior Court of Contra Costa County, Homer W. Patterson, J., rendered a judgment for defendant, and plaintiff appealed.

The Supreme Court, Shenk, J., modified the judgment, and as modified affirmed it, and held that refusal of a permit was permissible under a restrictive condition, if reasonable and made in good faith.

For prior opinion affirming the judgment, see 203 P.2d 562, and for opinion denying a rehearing, see 204 P.2d 937.

1. Covenants 🔑49

Restrictions on use of land will not be read into a restrictive covenant by implication; but if parties have expressed their intention to limit the use, that intention should be carried out, since primary object in construing restrictive covenants should be to effectuate legitimate desires of covenanting parties.

2. Covenants 🔑51(2)

Restrictive covenant providing that no house should be erected in residential subdivision until plans had been approved by corporation and permit issued gave corporation power to refuse permit for construction of house on fraction of lot remaining after portion on which existing house was situated had been sold, provided corporation's action was reasonable and taken in good faith.

3. Declaratory judgment 🔑2

Purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation. Code Civ.Proc. § 1061.

4. Declaratory judgment 🔑5, 394

Whether a determination is proper in an action for declaratory relief is a matter within trial court's discretion which will not be disturbed on appeal unless abused. Code Civ.Proc. § 1061.

5. Declaratory judgment 🔑366

Granting of declaratory judgment answering question of party's authority under restrictive covenant to prohibit construction, without determining closely connected question of reasonableness of party's action, was not an abuse of discretion. Code Civ.Proc. § 1061.

Nathan G. Gray, Berkeley, for appellant.

Breed, Robinson & Stewart, Edgar B Stewart, Oakland, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant in an action for declaratory relief. The plaintiff is the owner of a portion of lot 47 in the residential subdivision of Orinda Park Terrace in Contra Costa County. At one time the entire lot was owned by plaintiff's parents who built a residence on a portion of the lot and then sold that portion to a person not a party to this action. The remaining portion was retained by plaintiff's parents and later transferred to plaintiff. Upon offering her property for sale, plaintiff learned that defendant Hacienda Homes, Inc., would probably assert its authority to deny permission to build a dwelling house upon her fractional part of lot 47. Whatever authority defendant has to restrict building on the plaintiff's land must be derived from a restriction contained in the recorded map of Orinda Park Terrace and in the deeds to lots therein which reads:

"7. No dwelling house or other house or structure shall be erected until the plans and specifications with the proposed site therefor have been submitted to and approved by the first party hereto and by Hacienda Homes, Inc., and a written permit issued therefor."

Plaintiff brought this action to obtain a declaration that "plaintiff and her * * * successors in interest have a right to build and erect upon said real property a dwelling house or appurtenance thereto * * *." Subsequent to the filing of the complaint, in order to make its position clear in the pending action, defendant's directors specifically considered plaintiff's land and determined that her portion of lot 47 does not constitute an adequate and acceptable building site. The answer avers that the use of plaintiff's property as a building site would be detrimental and contrary to the desired and intended residential development of the Orinda area.

At the trial, both parties were prepared to present evidence as to the reasonableness of defendant's action, but in order to narrow the controversy, orally stipulated that the reasonableness of defendant's action was not in issue, and that the only question to be decided by the trial court was whether, in a proper case, defendant has authority under the restriction in question to determine that a site less than a full lot is not suitable for a residence. The evidence on reasonableness was therefore not presented. Nevertheless, the trial court rendered the following judgment:

"c) That said defendant Hacienda Homes, Inc., has not acted arbitrarily or capriciously or in excess of the power and authority conferred upon it under the provisions of said covenants, conditions and restrictions in determining that said real property does not constitute an adequate or proper building site under the provisions of said covenants, conditions and restrictions."

On appeal, plaintiff claims first, that the judgment wrongly construes the restriction and unduly extends its burdens, and second, that the judgment goes beyond the issue presented to the trial court by determining that defendant has not acted arbitrarily or capriciously.

As to her first claim plaintiff's position appears to be this: For the purpose of this action, the validity and enforceability of the seventh restrictive covenant is not challenged; plaintiff concedes that she or her successor must submit for defendant's approval plans for, and the proposed site of, any residence to be constructed on her land in order that uniform setback and sidelines may be preserved. But her contention is that the restriction does not grant authority to defendant to determine that a portion of a lot is an inadequate building site, irrespective of any plans or specifications which might be submitted. Plaintiff rests her proposed construction of the restriction on the established rule that restrictive covenants are to be strictly construed against limitations upon the free use of property. Wing v. Forest Lawn Cemetery Association, 15 Cal.2d 472, 101 P.2d 1099, 130 A.L.R. 120; Werner v. Graham, 181 Cal. 174, 183 P. 945; Martin v. Ray, 76 Cal.App.2d 471, 173 P.2d 573.

[1, 2] Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties. The restriction in question which is stated to be "for the benefit of all owners of property in the tract" declares that plans and specifications and the proposed site of any construction must receive the approval of defendant. Its clear purpose is to assure that proposed structures will accord with the design and development of the subdivision with regard to space, light and air, and will not detract from its appearance. The power to pass on plans for that purpose necessarily includes the authority to determine that a portion of an original lot is not large enough for dwellings of the type found in the tract, for it might be impossible to construct a residence on a portion of a lot which would comport with setback, sidelines and backlines, maintained as to the other residences. Thus the proper construction of the restriction would uphold the authority of the defendant, in a proper case, to decide prior to the submission of plans that any construction on a portion of a lot could not meet neighborhood standards.

The highest courts of Maryland, Massachusetts and Pennsylvania have held restrictions valid and enforceable which were similar to the one here involved, requiring approval of all construction by an individual or body of persons acting on behalf of other lot owners in a tract. Parsons v. Duryea, 1927, 261 Mass. 314, 158 N.E. 761—construction of driveway disapproved by trustees of tract enjoined; Jones v. Northwest Real Estate Co., 1925, 149 Md. 271, 131 A. 446—erection of disapproved second-story porch enjoined by real estate company; Harmon v. Burow, 1919, 263 Pa. 188, 106 A. 310—construction of dwelling house enjoined where grantor of tract lots refused to approve plans.

On oral argument the plaintiff placed great reliance on a decision of the court of Ohio Appeals, Exchange Realty Co. v. Bird, 16 Ohio Law Abst. 391, decided in 1933. In that case the lots of a subdivision were subject to a number of restrictions including the following: "1. Said real estate shall be used exclusively for private dwelling house purposes; no such house shall be erected, placed or suffered to remain upon said premises the cost of construction of which shall be less than Eight Thousand Dollars ($8,000.00), and no such house or other structure shall be erected, placed or suffered to remain thereon until the plans and specifications therefor, and its location upon said premises and the grade of the first floor level above the sidewalk, have been approved by the Exchange Realty Company or its duly authorized agent in the premises." Relying on this restriction the real estate company refused to approve asphalt shingles for the defendant lot-owner's roof and specified that wood or slate shingles were to be used. The Ohio court held that since there was no specific restriction as to the kind of roofing material which was to be used, the plaintiff could not direct the kind of shingles defendant could put on his house under the first restriction, declaring, 16 Ohio Law Abst. at page 394: "[i]t will be noted that such a covenant is always used in connection with some general plan or scheme or some other designated * * * restrictions within which such approval may operate, or that the covenant regulates the scope of approval; and the same is true in the instant case, as the restriction reads 'no such house.' The word 'such' presents the question, What house? and the answer evidently is that said word means the kind of a house provided for in the other designated restrictions. We find no decision or text to the effect that a covenant requiring the submission to and approval by the grantor, standing alone, without any other restriction, is enforceable. * * * If this language were the only restriction in the deed, it surely would be entirely too vague and indefinite to be enforceable * * * as standing alone it would be devoid of any general plan or scheme, would be unlimited in its scope, and would leave the purchaser subject to the mere whim of the seller. * * *"

There are obvious differences between the restriction in the Exchange Realty case and the one on which the defendant Hacienda Homes rests its authority. There the restriction provided that "no such house" should be constructed until plans and specifications had been approved by the realty company, and it was a possible and perhaps plausible interpretation that the words "such house" referred to the kind of house which was permitted by the other specific restrictions. That the restriction there did not confer any authority to restrict construction in ways other than those provided in the specific restrictions could further be inferred from the fact that the restriction requiring approval of "such" houses was contained in a paragraph in which there were specific provisions regarding the kind of houses which could be erected.

The phrase "such house" which in the Exchange Realty case was said to refer to the type of house defined in the other restrictions, is absent from the restriction in the present case which is one of eight paragraphs of restrictions and is separately numbered. None of the other restrictions except that limiting construction to dwelling houses or appurtenances thereto, bears upon the type or placement of any structure, for the other restrictive covenants prohibit listed commercial activities, limit the cutting of timber, provide that septic tanks shall not be constructed without the approval of Hacienda Homes, Inc., prohibit the existence of cess-pools, declare that no outside fire may be set without permission of Hacienda Homes, Inc., prohibit permitting animals to stray and forbid the discharge of firearms. Consequently there is no framework of specific restrictions within which the right to approve plans, specifications and site could be said to be confined.

Furthermore it is apparent that in deciding the Exchange Realty case, the Ohio court believed the action taken by the realty company to be arbitrary. The court states the sole question before it to be: "Can the plaintiff dictate the kind of shingles the defendant may put on his house?" and answered the question in the negative. It should be emphasized that we are not here dealing with the reasonableness of the action taken by the defendant. Each of the decisions enforcing like restrictions has held that the refusal to approve plans must be a reasonable determination made in good faith. Parsons v. Duryea, supra, 261 Mass. 314, 316, 158 N.E. 761; Jones v. Northwest Real Estate Co., supra, 149 Md. 271, 278, 131 A. 446; Harmon v. Burow, supra, 263 Pa. 188, 190, 106 A. 310. Thus the broad language of the Exchange Realty opinion to the effect that standing alone the restrictive covenant requiring approval of plans would leave the purchaser subject to the mere whim of the seller and would therefore be too indefinite to be enforced ignores the decisions cited which hold that the power to approve plans and site must not be exercised capriciously or arbitrarily.

Plaintiff argues that if the defendant has the right to determine that a portion of a lot, regardless of its size, is not suitable for a dwelling, then it could make the same determination with respect to an entire lot or group of lots. This result would not follow. The present action is concerned only with the authority of defendant to decide that a lot is inadequate, assuming its action is not arbitrary. It is clear from what has been said that the defendant's action must be reasonable and taken in good faith. Whether in this case the action taken by defendant with respect to plaintiff's lot was reasonable has been withdrawn as an issue by stipulation.

[3-5] The trial court might have denied declaratory relief as not being necessary and proper unless the parties were willing to submit for adjudication not only the question of the defendant's authority under the restrictive covenant to prohibit construction, but also the closely connected question of the reasonableness of its action. Code Civ.Proc. sec. 1061. The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747; Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 729, 146 P.2d 673, 151 A.L.R. 1062; Jackson v. Lacy, 37 Cal.App.2d 551, 561, 100 P.2d 313. That purpose is not accomplished where, by stipulation of the parties, an issue between the parties with respect to the same subject-matter is excluded from the judgment, and is almost certain to give rise to further litigation. Whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion, however, and the court's decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown, and such is not here the case, that the discretion was abused. California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422.

The trial court having entertained evidence solely on the question of defendant's authority to prohibit construction on subdivided lots, it appears there is merit in plaintiff's second claim that the judgment which was correct in its interpretation of the restrictive covenant, went beyond the scope of the settled issue in declaring that the defendant did not act arbitrarily or capriciously in exercising the power conferred upon it by the restriction.

All provisions in the judgment to the effect that defendant did not act arbitrarily or capriciously are stricken, and with this modification the judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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94 Cal.App.2d 702

WALLS et al. v. SYSTEM FREIGHT SERVICE.

Civ. 17176.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1949.

Rehearing Denied Dec. 6, 1949.

Hearing Denied Jan. 16, 1950.

John H. Walls and others filed suit against System Freight Service to set aside the judgments in two contested personal injury actions and to obtain a new trial therein on ground of newly discovered evidence.

The Superior Court of Los Angeles County, William B. McKesson, J., entered a judgment sustaining demurrer to complaint without leave to amend, and the plaintiffs appealed.

The District Court of Appeals, McComb, J., affirmed the judgment on ground that complaint did not state a cause of action.

1. Judgment ⚿335(1)

In California, a bill of review for a new trial for newly discovered evidence does not exist.

2. Judgment ⚿456(1)
New trial ⚿167(3)

The statutory period named within which newly discovered evidence may be brought into the case to change a judgment rendered applies both to equity and to legal proceedings for new trial, since in California all distinctions between actions in law and suits in equity have been abolished.

3. New trial ⚿167(3)

After motion for new trial has been denied or time within which motion may be made has elapsed, an independent action on ground of newly discovered evidence may not be made.

4. Judgment ⚿460(1)

A complaint which purported to be a bill in equity to set aside judgments in two personal injury actions and to obtain a new trial therein on ground of newly discovered evidence after motions for new trials had been denied in personal injury actions did not state a cause of action.

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Benjamin D. Brown and A. James Ayers, Los Angeles, for appellants.

Spray, Gould & Bowers, Los Angeles, by Harry L. Duckett, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment predicated upon an order sustaining a demurrer without leave to amend to a "Complaint for review of action for wrongful death to obtain a new trial", plaintiffs appeal.

Facts: The complaint is styled "Complaint for review of action for wrongful death to obtain a new trial." It purports to be a bill in equity to set aside the judgments in two contested actions and to obtain a new trial therein on the ground of newly discovered evidence. It alleges that on December 4, 1948, judgments were entered in favor of defendant and against plaintiffs after trial by jury of two actions to recover for personal injuries. On December 17, 1948, there were filed and served notices of motion for new trials which were denied January 17, 1949. In October, 1948, plaintiffs learned for the first time that one Gene Mehren possibly had witnessed the accident set forth in the original complaints. Two other witnesses were not known by plaintiffs prior to January 3, 1949. The present action was filed February 8, 1949.

Question: Do the foregoing facts state a cause of action?

[1-3] This question must be answered in the negative. A bill of review for a new trial for newly discovered evidence does not exist in this state. (Cunha v. Cunha (1935) 8 Cal.App.2d 413, 417, 48 P.2d 130.) It is to be noted that in the cited case a petition for a hearing was filed with the Supreme Court and denied September 19, 1935. Thus any statements in San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevinson, Inc., 175 Cal. 607, 166 P. 338 (1917), to the contrary were overruled by the later decision. (Bridges v. Fisk, 53 Cal.App. 117, 122, 200 P. 71; Kenney v. Antioch Live Oak School Dist., 18 Cal.App.2d 226, 228, 63 P.2d 1143.) Since, in California, all distinctions between actions at law and suits in equity have been abolished and a statutory period named within which newly discovered evidence may be brought into the case to change a judgment rendered, the same limitation applies both to equity and legal proceedings for a new trial. After a motion for a new trial has been denied or the time within which the same may be made has elapsed, an independent action on the ground of newly discovered evidence may not be made. The party has been afforded a remedy by the statute of which he has failed to avail himself.

[4] Since the complaint did not state a cause of action, the judgment entered upon the sustaining of the demurrer without leave to amend was correct.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.

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94 Cal.App.2d 609

NEEDHAM et ux. v. COLLAMER et ux.

Civ. 7630.

District Court of Appeal, Third District, California.

Nov. 14, 1949.

George G. Needham and wife sued Howard N. Collamer and wife to quiet title to certain land.

From a judgment of the Superior Court, Lake County, Benjamin C. Jones, J., for plaintiffs, defendants appealed.

The District Court of Appeal, Peek, J., affirmed the judgment, holding that the trial court's finding of an agreed boundary line between the parties' adjoining lots was sufficient to support the judgment, though such boundary was not acquiesced in for prescriptive period nor marked on the ground by a fence or similar monument.

1. Boundaries 🔑46(3)

While period of acquiescence in agreed boundary line between adjoining lots must generally be equal to period of statute of limitations to fix boundary by agreement, line agreed on by lot owners, building up to such line or otherwise so improving their properties that substantial loss would result if agreed line were subsequently changed, becomes true line.

2. Boundaries 🔑46(2, 3)

A boundary line agreed on by adjoining lot owners attaches to their deeds and is binding on them and their successors by subsequent deeds, so that owner suing to quiet title up to such line is not limited to assertion of record title.

3. Boundaries 🔑42

The trial court's finding of agreed boundary between adjoining lots of parties to suit to quiet title was sufficient to support judgment quieting plaintiff's title up to such line, though it was not acquiesced in for prescriptive period.

4. Boundaries 🔑37(1)

In suit to quiet title to plaintiff's lot up to agreed boundary line of defendant's adjoining lot, evidence sustained court's implied finding that substantial loss would result to plaintiffs if agreed line were moved, so as to establish it as true line.

5. Boundaries 🔑46(1)

While erection of fence or similar monument along agreed boundary line between adjoining lots would have great weight in fixing boundary, such means are not exclusive, since primary question is one of fact as to whether there was an agreed boundary and, if so, by what visible thing it was delineated.

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J. H. Brill, San Francisco, for appellant.

Lovett K. Fraser, Lakeport, for respondent.

PEEK, Justice.

The defendants appeal from a judgment entered in an action instituted by plaintiffs to quiet their title to certain property located in Lake County. Plaintiffs and defendants are the owners of adjoining lots and the controversy concerns the location of the boundary line between their respective properties.

By a deed dated February 8, 1945, J. Dan Moy and Evalene Moy conveyed to plaintiffs Lot 24 of a subdivision known as "Restricted Park Tract Subdivision of Lot 12, Clear Lake Acres", and on May 4, 1945 the same grantors conveyed to the defendants an adjoining lot designated as Lot 25 in the same division. The foregoing deeds described the property thereby conveyed by reference to the official map of the subdivision recorded in 1923.

The court found that the Moys were the owners of Lots 24 and 25 prior to the execution of the aforementioned deeds; that the westerly boundary of Lot 24 is coincident with the easterly boundary of lot 25; that at the time of the conveyance of lot 24 to the plaintiffs Mr. Moy indicated the boundary line to the plaintiffs as running from an iron stake driven in the ground at the northwest corner of lot 24 in a southerly direction to a double tree on the lakeshore and on into Clear Lake for a distance of 352 feet and that said line passed 30 inches west of the westerly wall of the garage located on lot 24. The court further found that plaintiffs, after the execution of the deed conveying lot 24 to them, occupied said lot 24 up to the line so indicated by Moy and have so occupied said lot ever since; that Moy occupied lot 25 up to the line so indicated and agreed upon; that the defendants, after the conveyance to them of said lot 25 by the Moys, occupied the same up to the boundary line so designated and agreed upon between Moy and the plaintiffs as the boundary line; and that plaintiffs put in a pipe line along the west line of their lot without objection by the Moys or the defendants as to its location.

A surveyor who, at the request of defendants, re-surveyed lot 25 in July 1945, placed the northeast corner of lot 25 approximately 2½ feet to the east from the iron stake found by the court to be the northwest corner of lot 24. The effect of the boundary line as established by said survey was to place part of the garage now located on lot 24 on to lot 25, whereas, as above stated, the boundary line as indicated by Moy and agreed upon with plaintiffs passed 30 inches to the west of the garage.

The defendants do not challenge the sufficiency of the evidence to sustain the foregoing findings, their contention being that such findings do not sustain the judgment as a matter of law, i. e., that before a disputed boundary can be fixed by agreement it must be acquiesced in for a period equal to the statute of limitations which admittedly is not the situation herein.

[1] While it is true as a general rule that the period of acquiescence in the agreed boundary must be equal to the period of the statute of limitations, Silva v. Azevedo, 178 Cal. 495, 173 P. 929, such rule is not without its exceptions. As stated in Young v. Blakeman, 153 Cal. 477, 95 P. 888, which case was cited with approval in Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881, experience has shown that measurements made at different times by different persons with different instruments will usually vary with the result that a line so established would never become a fixed boundary but would be subject to the variance of each new measurement. Hence it is now well established that where adjoining owners have agreed upon the true position of their boundary line, built up to it or otherwise so improved their property that substantial loss would result if the agreed boundary line were subsequently changed, 153 Cal. 477, 481, 95 P. 888, and regardless of its accuracy as may appear by subsequent measurements, such line becomes the true line called for by the respective descriptions. Howatt v. Humboldt Milling Co., 61 Cal. App. 333, 214 P. 1009.

[2] Additionally defendants argue that they can only be bound by the record title and that as against them plaintiffs can only assert such record title. A similar contention was made in the Young case, and the court therein stated that the line so agreed upon attaches to the deeds of the original parties and is binding on them and their successors by subsequent deeds. See also Martin v. Lopes, supra, and Loustalot v. McKeel, 157 Cal. 634, 108 P. 707.

[3, 4] It therefore appears that the finding of an agreed boundary herein is sufficient to support the judgment even though not acquiesced in for the prescriptive period. While the court made no express finding as to substantial loss it did find that plaintiffs had installed a pipe line along the agreed line and it further found that the agreed line lay to the west of plaintiffs' garage, whereas if the line were moved in accordance with defendants' survey a portion of the garage would be on defendants' property. Therefore there is sufficient evidence shown by the record herein to sustain an implied finding that substantial loss would result to plaintiffs if

the agreed line were moved. Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co., 72 Cal.App.2d 638, 648, 165 P. 2d 741.

[5] Defendants further contend that the agreed boundary line cannot be upheld because it is not "marked upon the ground by a dividing fence or similar monument". While the actual erection of a fence or like monument along an agreed boundary would have great weight in the fixing of such a boundary such means are not exclusive, since the primary question is one of fact going to the question of whether there was an agreed boundary, and if so by what visible thing was it delineated. Here the evidence shows and the court found that the line was fixed by the plaintiffs and the Moys as running from an iron stake, which had been in position for more than eighteen years, to two willow trees on the lake shore; that said line ran thirty inches to the west side of plaintiffs' garage, which garage had been built by Moy while he occupied the premises and in accordance with his understanding as to the boundary line.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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94 Cal.App.2d 745

GOODMAN v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 17125.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1949.

Action by William R. Goodman against the Atchison, Topeka & Santa Fe Railway Company and C. F. Smithson for false arrest and imprisonment.

The Superior Court, Los Angeles County, William S. Baird, J., entered judgment for plaintiff and granted defendants' motion for new trial, and the plaintiff appealed from the order granting the motion for new trial, and defendants appealed from the judgment entered in favor of the plaintiff and from an order denying defendants' motion for a judgment notwithstanding the verdict.

The District Court of Appeal, McComb, J., held that the trial court's determination that $8,500 award was excessive, and awarding new trial, was not an abuse of discretion, and affirmed order granting defendants' motion for new trial, and held that, since the judgment of the trial court was a nullity, defendants' appeal would be dismissed.

1. Appeal and error 🔑1005(4)

In passing on a motion for new trial predicated on the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence.

2. Appeal and error 🔑1005(2)

Appellate court will reverse trial court's determination on a motion for new trial on the insufficiency of the evidence only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

3. Appeal and error 🔑979(5)

Where plaintiff, arrested and detained in jail for two days, received $8,500 verdict in action for false arrest and imprisonment, trial court's granting of new trial on ground that award was excessive was not an abuse of discretion.

John M. Ennis, Los Angeles, for appellant and cross-respondent.

Robert W. Walker and Louis M. Welsh, Los Angeles, for respondents and cross-appellants.

McCOMB, Justice.

These are appeals (1) by plaintiff from an order granting defendants' motion for a new trial, and (2) by defendants from (a) a judgment entered in favor of plaintiff, and (b) an order denying defendants' motion for a judgment notwithstanding the verdict.

Facts: Plaintiff brought an action for false arrest and imprisonment against defendants. After trial before a jury a verdict was returned in favor of plaintiff in the sum of $8,500.00. The trial court granted defendants' motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict.

I—Plaintiff's Appeal.

Question: Did the trial court abuse its discretion in granting defendants' motion for a new trial?

[1, 2] This question must be answered in the negative and is governed by these rules: (1) In passing upon a motion for a new trial predicated on the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. (Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.) (2) An appellate court will reverse the trial court's determination on a motion for a new trial on the insufficiency of the evidence only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment. (Brooks v. Metropolitan Life Ins. Co., supra.)

[3] The evidence discloses that plaintiff had been employed for three years by defendant railroad; that he was arrested by the Los Angeles police on May 29, 1947, and held in jail until Saturday, May 31, 1947. Clearly it was a matter for the determination of the trial court whether plaintiff had suffered damages in the amount of $8,500.00 as a result of his false arrest and detention in jail for two days. We cannot say that in determining such an award was excessive, the trial judge abused his discretion. (Parker v. Brown, 13 Cal.App.2d 501, 505, 57 P.2d 183; Simpson v. Wilmer, 63 Cal.App.2d 501, 503, 146 P.2d 933; Koyer v. McComber, 12 Cal.2d 175, 182, 82 P.2d 941; Sinz v. Owens, 33 Cal.2d 749, 761, 205 P.2d 3.) Therefore the order granting the motion for a new trial must be affirmed.

II—Defendants' Appeals.

In view of the fact that the order granting defendants' motion for a new trial has been affirmed, the judgment in the trial court is a nullity. Hence defendants' appeals must be dismissed.

It is ordered: (1) that the order granting defendants' motion for a new trial is affirmed, and (2) defendants' appeal from (a) the judgment and (b) the order denying the motion for a judgment notwithstanding the verdict is dismissed.

MOORE, P. J., concurs.

WILSON, J., concurs in the judgment.

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94 Cal.App.2d 706

GATE-WAY, Inc. v. WILSON et al.

Civ. 16892.

District Court of Appeal, Second District,
Division 3, California.

Nov. 18, 1949.

Rehearing Denied Dec. 15, 1949.

Hearing Denied Jan. 16, 1950.

Action by Gate-Way, Inc., against W. B. Wilson and others to enjoin named defendant from disclosing trade secrets relating to installation of a patented process in plaintiff's plant and to enjoin other defendants from using information relating to such trade secrets.

The Superior Court of Los Angeles County, Carl A. Stutsman, J., entered judgment in favor of defendants and an order denying motion for new trial and plaintiff appealed.

The District Court of Appeal, Wood, J., held that the evidence sustained the findings and affirmed the judgment and dismissed the appeal from order denying a new trial.

1. Contracts 🔑28(3)

In action to enjoin consulting engineer from disclosing trade secrets relating to installation in plaintiff's plant of patented process for coating metal objects, evidence sustained finding that engineer had entered into no agreement not to reveal any process installed in plaintiff's plant.

2. Injunction ⚷128

In action to enjoin consulting engineer from disclosing trade secrets relating to installation in plaintiff's plant of patented process for coating metal objects, evidence sustained findings that such installation was not unique, original or novel, but had been in the public domain for many years and that plaintiff possessed no trade secrets in relation thereto.

3. Injunction ⚷128

In action to enjoin consulting engineer from disclosing trade secrets relating to installation of patented process in plaintiff's plant, evidence sustained finding that no confidential relationship existed between plaintiff and consulting engineer employed to assist in installation.

William J. Currer, Jr., and Walter Ely, Los Angeles, for appellant.

Huebner, Beehler, Worrel, Herzig & Caldwell, Vernon D. Beehler, Los Angeles, for respondent Wilson.

Benjamin J. Goodman and Paul G. Henderson, Los Angeles, for respondents Hillgren et al.

WOOD, Justice.

Action to enjoin defendant Wilson from disclosing plaintiff's alleged trade secrets, relating to a process of coating and lacquering door knobs and locks; and to enjoin defendants Hillgren Manufacturing Company, and Mr. and Mrs. Carl Hillgren, Carl C. Hillgren and Theodore Hamm, copartners doing business under the name of Hillgren Manufacturing Company, from using information, relating to such trade secrets, gained from defendant Wilson. Plaintiff appeals from the judgment in favor of defendants, and asserts that the evidence was insufficient to support the findings.

Plaintiff is engaged in manufacturing door knobs and locks. Defendant Wilson is a consulting engineer. The other defendants are also engaged in manufacturing door knobs and locks. Those defendants will be referred to herein as Hillgren.

Plaintiff alleged in its amended complaint that about June, 1947, plaintiff and Wilson entered into an oral agreement wherein it was agreed that Wilson for a consideration of $600 would furnish his services as a consulting engineer in designing and building processes and combinations of machinery, which would be substantially an automatic production line, for the more efficient painting and lacquering of door knobs and locks; that Wilson would not reveal to any other manufacturer or to a competitor of plaintiff any process which might be designed by plaintiff with the assistance of Wilson, and he would not reveal any ideas or methods of building or combining machines into a production line which might be used by plaintiff in connection with the painting and lacquering of articles manufactured by plaintiff; that great precaution would be taken to protect the secrecy of such processes; and that the guarding of such secrecy was necessary in order that plaintiff might reap the benefits of its efforts and expenditures in developing such processes. It was further alleged in the amended complaint as follows: Pursuant to said agreement, and by the mutual assistance of Wilson and officers and employees of plaintiff, machines were built which applied a certain process for painting and lacquering door knobs and locks, and said machines were so combined with other machines as to form a fully automatic production line for the painting and lacquering of door knobs, locks and other articles. Said machines and production line were and are unknown to other persons except those to whom defendant has disclosed the information in violation of his agreement and in violation of the confidence and trust plaintiff placed in him. Said process is a secret of plaintiff which is peculiar to its business. In order to build those machines and create such combination of machines plaintiff expended about $15,000. In the first part of August, 1947, the automatic production line was completed and Wilson was paid for his services. The machines and combination of machines formed the automatic production line, and said method of applying the process to plaintiff's business was very successful and resulted in a substantial competitive advantage to plaintiff. Thereafter Wilson, in violation of the confidence reposed in him by plaintiff and in violation of his oral agreement, offered to disclose to the other defendants the secret of said process and the automatic production line, and he offered to build for them machinery for a production line similar to that which had been built for plaintiff. The other defendants knew at the time of such offers that Wilson was violating the confidence reposed in him by plaintiff and that he was violating the agreement between plaintiff and Wilson. The other defendants accepted said offers, and Wilson is about to disclose to the other defendants said secret process and to build for them the same machinery and automatic production line which was built secretly for plaintiff. Unless Wilson is enjoined from disclosing such secret process to the other defendants the plaintiff will be damaged irreparably and the defendants will have succeeded in gaining knowledge of such secret process by unfair means.

The court found as follows (as stated in this paragraph): In June, 1947, plaintiff and Wilson entered into an oral agreement wherein it was agreed that Wilson for a consideration of $600 would furnish his services as a consulting engineer in the installation of the Ransburg coating process for the more efficient painting and lacquering of door knob lock sets, and that they orally agreed that the installation of the Ransburg process would be substantially automatic and would reduce the handling of the lock sets by the employees. Plaintiff and Wilson did not enter into any oral or written agreement by which Wilson agreed not to reveal to any other manufacturer or to any competitor of plaintiff any process, method, machine or combination of machines installed in plaintiff's plant with or without the assistance of Wilson. Plaintiff with the advice and under the direction of Wilson and with the advice, assistance and direction of the DeVilbiss Company, Natural Gas Equipment Company, Harper J Ransburg Company, and Bauer Winch and Hoist Company installed the Ransburg process in plaintiff's plant "along with a spray booth, bake oven, electrostatic field and conveyor system for the painting and lacquering of door knob lock sets." The Harper J. Ransburg Company acting as an independent contractor, installed the Ransburg process in plaintiff's plant. The DeVilbiss Company, acting as an independent contractor, installed a spray booth therein. The Natural Gas Equipment Company, acting as an independent contractor, installed a bake oven therein. The Bauer Winch and Hoist Company manufactured and provided the chain for the conveyor system therein. Plaintiff expended about $11,000 for the installation of the Ransburg coating process with the spray booth, bake oven and conveyor system. Wilson as a consulting engineer applied certain skill, experience and technical knowledge in the installation of the Ransburg coating process used in connection with a spray booth, bake oven and automatic conveyor system. In August, 1947, "the Ransburg coating process, along with the spray booth, bake oven and conveyor system, were completed and put in to operation" and Wilson was paid for his services. The allegations of the amended complaint relative to alleged offers by Wilson to disclose the secrets of said process, in violation of confidence and his agreement, are not true. The Ransburg coating process is a patented process under Letters Patent. The Harper J. Ransburg Company authorized plaintiff, under a written license, to use the Ransburg coating process. Hillgren is also a licensee of the Harper J. Ransburg Company. Wilson, in his relation with plaintiff, was an independent contractor. Door knobs were coated by others by an electrostatic coating process before the Ransburg coating process with the spray booth, bake oven, and conveyor system were installed in plaintiff's plant. There is no essential difference between the electrostatic coating of door knobs and such coating of other metal objects of uniform shape. The Ransburg coating process has been in the public domain for some years prior to June, 1947, and had been successfully used in coating hardware of all kinds and in spraying articles of uniform shapes in mass production in automatic production lines including rotating vertical spindles. The construction and installation of the closed spray booth in connection with the Ransburg process, and the construction and installation of the bake oven in connection with said process, were not unique, original or novel but said closed spray booth and bake oven and similar closed spray booths and bake ovens had been in the public domain for many years and are disclosed in detail in trade publications, catalogues, and photographs which are available to anyone. All the individual parts installed in plaintiff's plant were combined to accomplish the process of coating door knob sets and the combination is the subject of common knowledge, is in the public domain, and is disclosed in detail in patents, trade publications, catalogues and photographs. The electrostatic coating process in Hillgren's plant is similar to the process in plaintiff's plant, but the similarity relates to matters in the public domain or to matters peculiar to the electrostatic coating process practiced under the Ransburg patents and under license from the Ransburg Company. Both plaintiff and the Hillgren Manufacturing Company use the process under license from the Ransburg Company. The coating process used by Hillgren Manufacturing Company is similar to the process used by other licensees of the Ransburg Company prior to June, 1947. The process used by Hillgren is in many respects dissimilar from the process used by plaintiff, and Hillgren did not use any of plaintiff's plans, drawings, or the specifications used by plaintiff in the installation of the process in its plant. Hillgren did not induce any breach of contract, confidence or trust between plaintiff and Wilson, and all information used by Hillgren in the installation of the process in its plant was obtained fairly from the public domain and was not obtained from plaintiff. Hillgren has not engaged in unfair competition with plaintiff. The electrostatic process in plaintiff's plant would be inoperative without the Ransburg electrostatic coating apparatus, and said apparatus is the basic element of the coating process. The court also found (as shown by the findings placed under the heading of conclusions of law) that plaintiff has not used any trade secrets in the installation of the Ransburg coating process, including the closed spray booth, bake oven, conveyor system, and lacquer, and that no trade secrets have been used in the operation of the entire process; that plaintiff was not and is not possessed of any trade secrets in connection with said process; and that there was no confidential relationship between plaintiff and Wilson.

A general description of the Ransburg patented coating process is as follows: The process makes use of static electricity to charge the article to be coated and to charge the spray of coating material, with charges of opposite poles, thereby causing the spray material to be attracted to the article to be coated. In that process the article is the "ground" and the spray is charged in an electrostatic field, which field consists of a tubular framework strung with fine wires that are charged with high voltage.

Generally stated, the description of the production line apparatus, constructed in plaintiff's plant, is as follows: There is a conveyor, consisting of an endless chain, which carries the article that is to be coated. On the chain there are upright spindles, upon the tops of which the articles to be coated are placed, and the spindles rotate the articles while they are carried through the spraying and drying process. The conveyor carries the articles to be coated from the loading zone through a spray booth, a vestibule, and an oven to an unloading zone or room where the coated articles are removed and placed in racks for assembly. The spray booth is enclosed, except at the ends thereof where the conveyor enters and leaves the booth, and except at a vent where excess vapors are taken off. Air is drawn into the booth through air filters, and it is withdrawn from the booth, in such a manner that the air movement in the booth is slow enough to prevent disruption of the mist-like spray which comes through the electrostatic field, and at the same time the air movement therein is fast enough to draw off the excess spray. Air in the spray booth is of room temperature. Adjoining the spray booth is a vestibule which extends to and adjoins the oven. The vestibule prevents the hot oven air from going into the spray booth, and it prevents the room temperature air of the spray booth from going into the oven. The oven dries the coating which has been placed upon the articles in the spray booth. Hot air is conducted into and through the oven.

[1] Appellant asserts that the evidence was insufficient to support the finding that plaintiff and Wilson did not enter into any agreement wherein Wilson agreed not to reveal any process installed in plaintiff's plant. There was a substantial conflict in the testimony as to whether there was such an agreement. Mr. Schoepe, president of the plaintiff company, testified that before he paid $300 in advance to Wilson he told Wilson that any work that was to be done on the installation must be kept in strict confidence, and that Wilson then said, "Yes." Mr. Herman Miller, a partner in the Miller Brothers Company, which is the distributing agent for the Ransburg process, testified that, after the installation was completed, he asked Mr. Schoepe and Wilson if they would let him take some pictures of the installation; that Mr. Schoepe said that he was undertaking to keep the development confidential, and Wilson said something "about refusing to permit any pictures to be taken because of some rubbish or something of that type." Wilson testified that he did not have any conversation with Mr. Schoepe concerning the secrecy of the machine; and that he did not have any conversation with him in which anything was said about not building a similar machine or production line for any competitor of plaintiff. The evidence was sufficient to support said finding.

Appellant also contends that the evidence was insufficient to support the findings that (1) the construction of the closed spray booth and the oven, in connection with the Ransburg process, is not unique, original or novel, but such construction has been in the public domain many years prior to June, 1947; and (2) plaintiff has not used, and was not possessed of, any trade secrets in connection with the installation of the Ransburg process. The Pugh patent issued in 1932, which is owned or controlled by the Harper J. Ransburg Company (defendant's exhibit T), shows a closed spray booth with double doors at each end and a conveyor to carry objects through the booth. Defendant's exhibit G, a circular on which there is a photograph of a Ransburg installation in the Frank I. King Company, shows an enclosed spray booth, and a conveyor with rotating vertical spindles on it. Mr. Miller, agent of the Ransburg Company, testified that the Ransburg process, shown in the photograph, was installed about May, 1946, and that it has been in operation since then, and that it could be used for coating door knobs. Mr. Miller also testified that a Ransburg process was installed at the Norge Refrigerator plant about February, 1946; that it has a closed spray booth with air filters in it, and it has a conveyor and an oven. Mr. Miller did testify, on cross-examination by plaintiff's counsel, that at the time of the installation at plaintiff's plant he did not know of any other electrostatic installation which was substantially the same as that at plaintiff's plant. On redirect examination he said that he meant (by the answer just referred to) that plaintiff's particular process is different in appearance, size and dimensions.

Wilson testified that in 1946 he designed an installation for the Fir-Tex Corporation for using the Ransburg process in coating artificial tile; that said installation included a closed spray booth, air filters, a vestibule, an oven, and a conveyor system. He also testified that before he entered into the transaction with plaintiff he took Mr. Schoepe to Miller Brothers' demonstration plant, and there, in the presence of Mr. Miller, they coated several door knobs. That demonstration plant had a spray booth, a conveyor, and lights for the baking process.

The Pugh patent, pertaining to the Ransburg process, states among other things that the invention relates to methods of coating and finishing metal parts, that a principal object of the invention is to provide an expeditious method for applying material uniformly to exposed surfaces, and that one embodiment of the invention contemplates the conveying of metal parts to be coated "through a closed chamber, the parts on the conveyor being connected in their passage therethrough to one terminal of a score of electrical energy of high potential."

It is not contended that the oven in plaintiff's plant is a trade secret, but Mr. Schoepe did testify that the venting of the oven was a part of his trade secret. He said that he developed the venting by trial and error, and that the trial and error method was definitely a part of his secret. It does not appear, however, that the alleged secret is with respect to the venting of the oven. Furthermore, it does not appear what plaintiff's alleged secret is with respect to the whole production line or any part of it. On cross-examination the following occurred: "Mr. Schoepe, tell me, if you can, what your trade secret is? A. That is my secret; I am not going to tell you."

[2] No attempt has been made in this opinion to describe in detail the design and operation of the several coating processes referred to in the evidence as processes which were in existence prior to the installation of a coating process in plaintiff's plant. Such a description would extend this opinion unnecessarily. Sufficient references to other installations of coating processes have been made to show that there was sufficient evidence to support the finding to the effect that in connection with the use of the Ransburg patented process there were in existence and use and in the public domain, prior to the making of the installation in plaintiff's plant, a closed spray booth, an oven, a conveyor with upright rotating spindles, and a vestibule; and that there was sufficient evidence to support the finding that plaintiff was not possessed of trade secrets. It was a question of fact for the determination of the trial court as to whether the installation at plaintiff's plant was unique, original or novel, as to whether the installation had been in the public domain, and as to whether it was a trade secret. The evidence was sufficient to support the findings of the trial court with respect thereto.

[3] Appellant also asserts that the evidence was insufficient to support the finding that there was no confidential relationship between plaintiff and Wilson. It argues that a confidential relationship existed between them by reason of the fact that Wilson was a consulting engineer. Whether such a relationship existed was a question of fact for the trial court to determine. The spray booth, oven, vestibule, and conveyor were made and installed by different companies, as above stated, and on occasions the representatives of those companies were present at the same time in plaintiff's plant while the various parts of the process were being installed. Also, many of plaintiff's employees were present while the installation was being made. The evidence was sufficient to support said finding.

By reason of the above conclusions, which require affirmance of the judgment, it is not necessary to discuss other contentions of appellant.

The judgment is affirmed, and the appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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94 Cal.App.2d 613

PEOPLE v. EKBERG.

Cr. 728.

District Court of Appeal, Fourth District, California.

Nov. 14, 1949.

Rehearing Denied Nov. 26, 1949.

Hearing Denied Dec. 12, 1949.

James Nels Ekberg was convicted in the Superior Court of San Diego County, Dean Sherry, J., of issuing a check without funds with intent to defraud, and of possession of firearms capable of being concealed on the person by one previously convicted of a felony, and he appealed.

The District Court of Appeal, Barnard, P. J., affirmed the judgment, holding that evidence sustained convictions, that exclusion of defendant's evidence was not error, that giving of certain instruction was not prejudicial error, that record failed to establish that superior court was prejudiced against defendant and that fact that defendant did not receive transcript until more than 90 days after notice of appeal was filed was not prejudicial.

1. False pretenses 🔑9

Actual presentation of no-fund check by payee to bank was unnecessary in order to make the one who executed the check chargeable with issuing a no-fund check.

2. False pretenses 🔑49(1)

Evidence sustained conviction of issuing a no-fund check with intent to defraud.

3. Weapons 🔑17(4)

Evidence sustained conviction of possession of a firearm capable of being concealed on the person by one previously convicted of a felony, though there was no clip in pistol or shell in chamber, where a clip was in defendant's pocket. Gen.Laws, Act 1970, § 2.

4. Criminal law 🔑1202(3)

In prosecution for possession of firearm capable of being concealed on the person by one previously convicted of a felony, wherein defendant stipulated that he had previously been convicted of a felony as charged, defendant's evidence that he had served an extra period of imprisonment and probation under former judgment of conviction, as was developed after part of former judgment of conviction was reversed on appeal, was properly excluded as not material. Gen.Laws, Act 1970, § 2.

5. Criminal law 🔑778(9), 1186(4)

In prosecution for possession of a firearm capable of being concealed on person by one previously convicted of a felony, instruction that there was no presumption that an accused is a person of good character should not have been given, though it was not inherently wrong, but giving of instruction did not justify reversal, in view of the record, where court otherwise gave usual instructions with respect to all presumptions of innocence which run in favor of a defendant. Gen.Laws, Act 1970, § 2; Const. art. 6, § 4½.

6. Criminal law 🔑655(1)

Statement of trial judge, just before sentence was pronounced and while judge was reviewing the facts in response to plea for leniency, that judge thought that defendant should have pleaded guilty to charges, did not establish prejudice or bias on part of judge.

7. Criminal law 🔑1165(1)

Fact that defendant did not receive a transcript in the matter, at state prison, until more than 90 days after notice of appeal was filed, was not prejudicial error where, because of such situation, District Court of Appeal twice extended time for filing of defendant's opening brief, and it was then filed in time.

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James Nels Ekberg, in pro. per.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of issuing a check without funds with intent to defraud. In a separate action he was charged with the crime of possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. He pleaded not guilty and not guilty by reason of insanity in each action. At his request the actions were consolidated for trial and tried together. A jury found him guilty on both charges, and later the same jury found him sane at the time of each of the offenses was committed. The defendant waived application for probation, and separate judgments were entered. While the defendant had been represented by counsel at the trial, he filed a notice of appeal in propria persona, this notice being filed only under the number of the cause involving the possession of a firearm. He disclaims any intention to appeal on the insanity issue, but insists that he intended to appeal in both cases, and argues that since the causes were thus intertwined the appeal should be considered as having been taken with respect to both charges. Since the appeal was taken by the defendant personally, without the aid of counsel, we prefer to follow that course.

The general facts relating to these cases are as follows. On the afternoon of February 14, 1949, the appellant entered Hancock's Flower Shop in San Diego, represented himself to be connected with the TWA Airlines, and ordered three orchid corsages saying they were for airline hostesses. He also placed a telegraph order for flowers to be delivered to his wife in Kansas City, giving her correct address. In payment therefor he wrote a check for $19.82 on a Los Angeles bank. He then stated that the address he had placed on this check was wrong and at his request Hancock tore up that check, and filled out another check on the same bank, with a different address. Both of these addresses were fictitious. The appellant signed the second check and left the store taking the three boxed orchids with him. Hancock saved the pieces of the first check. Having become suspicious, he phoned the Los Angeles bank and learned that the appellant had no account there, a fact which was conclusively established at the trial.

About 2:30 A.M. on the morning of February 15, 1949, the appellant, while in a grill in San Diego, displayed a pistol in a manner which alarmed the cashier. She called the police and when they arrived they found a .380 Colt automatic pistol under the appellant's belt and covered by his coat. At that time there was no clip in the gun or shell in the chamber. However, a clip for the gun was found in his pocket. The appellant told the officers that he had bought the gun a good many years ago.

[1, 2] A number of points first raised by the appellant are to the effect that the evidence is not sufficient to sustain the verdict and judgment as to either charge. With respect to the check charge, it is argued that the evidence discloses that Hancock was not deceived or defrauded since he knew that the check was no good and did not send the flowers to the appellant's wife, and since he knew that the appellant was too drunk to know what he was doing; that Hancock did not endorse or deposit the check or deliver the flowers since he knew before he took it and before the appellant left the store that it was worthless; and that the check was actually presented to the bank by a notary public, and went to protest, some thirty days after the information was filed in that case. These contentions are based upon a part of the evidence and inferences the appellant would draw from portions thereof. There is, however, ample evidence as to every element essential to this charge. While Hancock's testimony discloses that he became suspicious and had some doubts about the matter before the appellant left the store, it also appears that he did not know that the check was not good, that he did not want to accuse the appellant in that manner, and that "I thought it was all right." Not only is this interpretation of his testimony a reasonable one, but it is supported by the fact that he permitted the appellant to leave with the boxed orchids, the main part of the purchase. His failure to send the remaining flowers to the appellant's wife occurred later, after he had learned that the check was worthless. While Hancock admitted that the appellant appeared to him at the time to be "pretty well inebriated" and not "in too good condition," the evidence is far from showing that the appellant was so drunk that he did not know what he was doing or that Hancock was aware of any such fact. The appellant was able to write out the first check, giving the false address thereon, to instruct Hancock to fill out another check with a different false address upon it, and to give his wife's correct name and address in Kansas City. Moreover, it is the appellant's intent which is the most important consideration. The actual presentation of the check by Hancock was unnecessary, under the circumstances, and it was presented by the notary about two weeks before the information was filed. These were questions of fact for the jury and its findings thereon are sufficiently supported by the record.

[3] With respect to the possession of a firearm charge it is argued that the alleged weapon was not a "deadly weapon" since it was "in disassembled form", with "parts missing", and without bullets or cartridges. Section 2 of what is known as the "Dangerous Weapons' Control Law", Deering's Gen. Laws, Act 1970, forbids the possession of certain firearms by one who has been convicted of a felony under the laws of the United States, of the state of California or of any other state or country. There is no evidence that any part of this automatic pistol was missing. While the clip was not in the gun the appellant had it in his pocket. The appellant concedes that the barrel of this gun was less than twelve inches in length, and it was stipulated at the trial that the weapon was "capable of being fired", and that it was meant thereby that if a shell had been in the gun at the time the gun would properly discharge the shell. The evidence is sufficient in this respect.

[4] The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, "Impersonation of a U. S. Officer," with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is "illegal and void" since it developed at the trial that this former judgment had actually been reversed in the case of Ekberg v. U. S., 1 Cir., 167 F.2d 380. When the district attorney attempted to introduce evidence that the appellant had been previously convicted as alleged in the information, appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at Leavenworth and at Atlanta; and "that said judgment has never since been reversed, annulled or set aside." An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had "not a thing" to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stipulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection.

[5] It is next contended that the court erred in giving one instruction, which reads: "You are further instructed that there is presumption that the defendant, on trial upon a criminal charge, is a person of good character." This was given in connection with another instruction relating to the introduction of evidence as to good character. While this instruction is not inherently wrong, People v. Hill, 76 Cal. App.2d 330, 173 P.2d 26, we agree that it should not have been given here. However, we are unable to see how it could have been prejudicial on the record before us, including the defendant's own testimony, the court otherwise gave the usual instructions with respect to all the presumptions of innocence which run in favor of a defendant, and any possible error would not justify a reversal. Art. VI, Sec. 4½, Const.

[6, 7] Appellant raises several further points under the general contentions that his constitutional rights were violated and that the trial judge was biased and preju-

diced against him. The contention that judgment was not pronounced within five days after the verdict is not supported by the record. The verdict upon the plea of not guilty was returned on May 11, 1949. The verdict upon the plea of not guilty by reason of insanity was returned on May 13, 1949. Judgment was pronounced and sentence imposed on May 18, 1949. The court did not refuse to consider an application for probation. Aside from the fact that the appellant was ineligible for probation, he waived an application for probation immediately after the verdicts were returned on the insanity issue. The facts which the appellant insists could have been brought to light through a probation hearing were fully brought out in a statement made to the court by appellant's counsel. The appellant was not without counsel when judgment was pronounced. Judgment was purportedly pronounced on May 17, with his regular counsel present. It was discovered that he had not been properly arraigned for judgment and, on May 18, this proceeding was set aside and judgment again pronounced. At that time appellant's regular counsel was unable to be present and he was represented by another counsel, with his consent expressed in open court. Bias is attributed to the trial judge in that he remarked that he thought the appellant should have pleaded guilty to these charges. This occurred just before sentence was pronounced and while the judge was reviewing the facts in response to counsel's plea for leniency. The judge referred to appellant's attitude in court and to his record, including more than fifty arrests with fourteen of them on charges of a serious nature. In commenting thereon, the judge stated that if the appellant had had the proper attitude of humility he would have pleaded guilty to these charges. Neither prejudice, bias nor error appears. Complaint is further made that appellant did not receive the transcript in this matter, at the state prison, until more than ninety days after notice of appeal was filed. Because of the situation which developed, this court twice extended the time for filing appellant's opening brief, it was then filed on time, and no prejudice appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

94 Cal.App.2d 704

COHEN v. MARX et al.

Civ. 17264.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1949.

Hearing Denied Jan. 16, 1950.

Samuel S. Cohen sued Julius "Groucho" Marx and another, for alleged invasion of plaintiff's right of privacy.

The Superior Court of Los Angeles County, William B. McKesson, J., entered a judgment for defendants, and plaintiff appealed.

The District Court of Appeal, McComb, J., affirmed the judgment, and held that the complaint did not state a cause of action.

1. Torts 🔑8

A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy.

2. Torts 🔑26(1)

Complaint which alleged that plaintiff had been a professional boxer for six years under a certain name and continued his ring career until 1939 when he abandoned the prize ring as a career, and which alleged that radio comedian on broadcast in 1949 stated he had once managed prizefighter by name once used by plaintiff and brought him to California where he was knocked out, did not state a cause of action for invasion of "right of privacy."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Right of Privacy".

Moidel, Moidel, Moidel & Smith, Los Angeles, Isadore Moidel, Los Angeles, for appellant.

Lillick, Geary & McHose, William A. C. Roethke, Los Angeles, and Robert B. Stillman, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrer without leave to amend in an action to recover damages for alleged invasion of plaintiff's right of privacy, plaintiff appeals.

The essential allegations of plaintiff's complaint as amended were that:

In 1933, he had entered the prize ring as a professional boxer under the name of "Canvasback Cohen"; that he continued this ring career, losing decisions, until about 1939, when he abandoned the prize ring as a career; that on January 12, 1949, defendant Groucho Marx broadcast over a program of the defendant American Broadcast Company on its program "You Bet Your Life", "I once managed a prize-fighter, Canvasback Cohen. I brought him out here, he got knocked out, and I made him walk back to Cleveland."

The sole question presented for our determination is:

Did plaintiff, by entering the prize ring, seeking publicity, and becoming widely known as a prize fighter under the name of "Canvasback Cohen" waive his right to privacy?

[1] This question must be answered in the affirmative. A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy. (Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 312, 95 P.2d 491; Sidis v. F-R Pub. Corporation (2 Cir.) 113 F.2d 806, 809, 138 A.L.R. 15.)

[2] Applying the foregoing rule to the facts in the present case it is evident that when plaintiff sought publicity and the adulation of the public, he relinquished his right to privacy on matters pertaining to his professional activity, and he could not at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver.

In view of the foregoing rule and the facts as alleged in the amended complaint, the pleading did not state a cause of action and the trial judge properly sustained a demurrer thereto without leave to amend.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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94 Cal.App.2d 655

STEINER v. THOMAS et al.

Civ. 16867.

District Court of Appeal, Second District,
Division 2, California.
Nov. 17, 1949.

Gisela E. Steiner brought action against Dorothea Thomas, John Hancken, and John Hancken, executor of the estate of Dorothea Thomas, for alleged breach by Dorothea Thomas of agreement to bequeath property to plaintiff, wherein special plea of res judicata was interposed.

A judgment upholding the special plea was entered by the Superior Court, Los Angeles County, James H. Pope, Judge of Municipal Court of City of Los Angeles, County of Los Angeles, presiding as Judge of Superior Court under designation of the Chief Justice as Chairman of the Judicial Council, and the plaintiff appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgment on ground that special plea of res judicata was properly sustained.

1. Judgment ⚷958(1)

Where special issue of res judicata was interposed, it was proper to try such issue and to enter judgment against plaintiff after trial court had ascertained that special plea was substantiated. Code Civ.Proc. § 597.

2. Judgment ⚷951(2)

In action for breach by decedent of agreement to bequeath property to plaintiff, where special plea of res judicata based on prior action between same parties for rescission of contract for conveyance of the same property on ground that conveyance was induced by fraud was interposed, files in estate of decedent and in termination of joint tenancy of her husband, in addition to file of prior suit, were competent proof of adjudication of issue raised by present complaint.

3. Judgment ⚷744

A judgment denying rescission of contract for conveyance of realty by plaintiff to defendant's decedent allegedly induced by fraud was an adjudication of plaintiff's claim of breach by decedent of same agreement to bequeath the property to plaintiff, where latter claim was coexistent with that alleged in former action. Code Civ.Proc. §§ 1908, 1962, subd. 6, 1963, subd. 18.

4. Judgment ⚷713(2)

A judgment estops plaintiff from maintaining a subsequent action between same parties, not only as to issues raised, but also as to every other issue that might properly have been litigated. Code Civ. Proc. § 1908.

5. Election of remedies ⚷14

Where a litigant with knowledge of all the facts has elected one of two inconsistent remedies and pursued it to judgment, she cannot thereafter proceed upon the other.

6. Judgment ⚷948(1)

If matter alleged in second action is within scope of the first and is so relevant to issues that it could have been presented in the former action, the judgment in prior action bars maintenance of second action even though it is not specially pleaded. Code Civ.Proc. § 1908.

7. Estoppel ⚷3(2)

Plaintiff, having chosen to prosecute her action by alleging that writings of defendant's decedent constituted a fraudulent design to cheat plaintiff out of property, could not in a later cause maintain that the same writings constituted a bona fide contract to devise property to plaintiff. Code Civ.Proc. §§ 1908, 1962, subd. 6, 1963, subd. 18.

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Edward S. Cooper and John Boyce-Smith, Los Angeles, for appellant.

James V. Brewer and Everett C. Rauh, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether a judgment denying the rescission of a contract for the conveyance of realty allegedly induced by fraud was also an adjudication of plaintiff's claim of a breach by the grantee of the same agreement to bequeath the property to appellant, such claim being coexistent with that alleged in the former action.

In September, 1946, appellant sued the executor of the estate of Dorothea Thomas alleging (1) that decedent had breached her agreement to devise lot 83 of tract 1976 in Los Angeles County; (2) that by such agreement made in October, 1930, appellant had conveyed lot 83 of tract 1976 to Dorothea "as consideration" for the latter's promise to devise it by her last will to appellant; (3) that the consideration for the contract was the deep love that existed between the two, her service to decedent and her own forbearance to sue Dorothea for the lot. The alleged agreement to devise was evidenced by two letters written to appellant by decedent.

The administrator entered a general denial to the fifth amended complaint and pleaded in bar certain statutes of limitation and the statute of frauds requiring an agreement to devise property to be evidenced by a writing. In addition, he pleaded that the findings and judgment in action 494,796 of the same court, herein referred to as 494, was res judicata of the issues raised by the fifth amended complaint.

The case having come on for trial, the court heard respondents' motion for judgment on the pleadings after appellant had requested the court first to try the plea of a former adjudication. Respondents' motion was granted on the ground that action 494 filed and tried in 1944 had determined the same issues raised by the fifth amended complaint.

The file in 494 disclosed that Dorothea's executor recovered a final judgment on the merits of appellant's suit for rescission. The pleadings in such file show that in such action appellant alleged that she was by decedent fraudulently induced to visit Europe and that while she was residing in Czechoslovakia in 1930 Dorothea fraudulently induced her to convey lot 83 to Dorothea so that the latter could collect the rents and protect the property, and promised to reconvey the lot to appellant on the latter's return home; that in reliance upon such representations, without consideration she conveyed the lot to Dorothea. She supplemented her allegations of fraud by a recital of her intimate personal relationship with decedent as one of mother and adopted daughter. The findings in 494 disclose also that appellant acknowledged full payment for the deed to lot 83 and that Dorothea Thomas was "after the 13th day of October, 1930, the owner of and entitled to the possession of and was in the actual and exclusive possession of this property until her death * * * and that the claim of plaintiff and all others claiming through her are without any right whatsoever in the premises." Also, respondent introduced in evidence by reference the file in the Matter of the Estate of Dorothea Thomas showing that she had deceased February 13, 1945, and that her last will had been admitted to probate.

On the trial of the instant action the court had before it (1) appellant's allegations of her ownership of lot 83, (2) the two letters alleged to constitute decedent's last will, (3) her complaint in 494 alleging the agreement of Dorothea to devise the lot to appellant, (4) the same two letters used as exhibits in 494 and (5) the judgment roll in the latter action.

[1, 2] It was correct procedure to try the issue of res judicata and to enter judgment against the plaintiff after the court had ascertained that the special plea was substantiated. Code Civ.Proc. sec. 597. After reaching such conclusion it would be sheer nonsense to consume the time of a court by investigating the merits of the alleged contract and claim of appellant. The documents offered as proof of the plea included, besides the file of 494, the files in the Estate of Dorothea Thomas and in the Termination of the Joint Tenancy of Louis Henry Thomas, deceased. All such files were competent proof of a prior adjudication of the issue raised by the fifth amended complaint. Olwell v. Hopkins, 28 Cal.2d 147, 151, 168 P.2d 972.

Appellant deems herself aggrieved by not having had a trial herein on the merits. The fact is that in the former action the merits of all the facts were determined and relief was denied her. Upon presentation of the special plea in the instant action the court had merely to decide whether the facts alleged in the first suit for rescission of the contract were substantially those alleged in the second action for breach of the same contract. In the first amended complaint of 494 it was alleged that from 1928 to 1944 a close, intimate friendship existed between the women; that defendant frequently stated that she had adopted plaintiff; that in 1942 she stated that she had made a will of lot 83 and other properties to plaintiff; that she intended to leave all her property to plaintiff; that in 1944 she discovered that decedent had sold lot 83 and that the promise to leave it to plaintiff was impossible of performance.

The findings in 494 determined the facts contrary to the allegations of appellant and also that the relationship between the two women did not excuse plaintiff from looking after her own affairs or hinder her from taking legal action for the protection of her asserted rights to lot 83; that while Dorothea wrote two letters[1] prior to her will purporting to devise her estate to plaintiff, they have not been admitted to probate; but that on March 23, 1945, the last will of Dorothea was duly admitted to probate; that prior to an altercation between plaintiff and Dorothea, the latter frequently stated that she intended to bequeath her property to plaintiff but that after the altercation Dorothea struck and beat plaintiff and the latter then created a disturbance of the peace "necessitating the calling of police officers to subdue plaintiff" and therefore Dorothea made no bequest to plaintiff. Final proof of the identity of the issues is found in the fact that the evidence used to prove her cause in 494 consists of the same documents pleaded by appellant, namely, the two letters written by decedent. While appellant had knowledge of the pendency of the probate proceedings of decedent, she did not herself offer the two letters for probate.

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[1] "Vera * * * I have no one to write for me. * * * I want you to stop being jealous. That is a sickness. You will still get everything I have. Stop

[3, 4] The judgment therefore was correct in decreeing that 494 was res judicata of the instant action. Code Civ. Proc. sec. 1908. A judgment estops the plaintiff from maintaining a subsequent action between the same parties, not only as to the issues raised but also as to every other issue that might properly have been litigated. The estoppel is effective not only where the grounds for recovery in the second action are identical with those pleaded in the first which he failed to prove but he is likewise barred where he failed to allege those grounds in his first suit. Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242; Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Slater v. Shell Oil Co., 58 Cal.App.2d 864, 868, 137 P.2d 713; Rest. Law of Judgments, sec. 63a.

[5-7] Not only is a litigant barred by his former allegations and the findings thereon but when having knowledge of all the facts and has elected one of two inconsistent remedies and pursued it to judgment, he cannot thereafter proceed upon the other. Verder v. American Loan Society, 1 Cal.2d 17, 32, 32 P.2d 1081. His commencement of the first remedy spells a perpetual inhibition against his resort to a second. Hines v. Ward, 121 Cal. 115, 120, 53 P. 427. He is estopped from asserting repugnant rights. Mansfield v. Pickwick Stages, 191 Cal. 129, 130, 215 P. 389. If the matter alleged in the second action is within the scope of the first and is so relevant to the issues that it could have been presented in the former action the judgment in the prior bars the maintenance of the second action even though it is not specially pleaded. Were the rule otherwise, a party might designedly withhold issues and litigate them in consecutive lawsuits. Sutphin v. Speik, supra. Therefore, appellant, having chosen to prosecute her action by alleging that decedent's writings constituted a fraudulent design to cheat appellant out of lot 83, cannot in a later cause maintain that those same writings constitute a bone fide contract to devise the property to appellant.

It is contended that there can be no res judicata of an issue which appears not to have been determined. Appellant argues that the effect of the finding in 494 is that Dorothea was not guilty of fraudulent representations in inducing appellant to convey lot 83 and therefore appellant might have been induced to convey the lot by an agreement honestly made at the time to leave it to appellant by last will which

you yelling. You had everything you wanted here at home. And nothing was good enough for you. Now I have a friend with me * * * don't worry he doesn't want my money. * * *

"Doris

"Los Angeles, Calif.
"June 18, 1943

"Dear Vera: * * *

"I would advise you not to come down here as Billy comes here real often. He was here yesterday again. He is just crazy to find out where you are & I have the mail man bring the mail to the house.

"Billy has moved over here on 84th & Broadway in the big apartment house so he is pretty close by. * * * I didn't need the oil as I can walk fine. Ivy comes & gives me my shot and treatment every day. * * *

"Love,
"Doris

"When you want something let me know & I'll send it to you."

could not be broken until Dorothea's decease. In support of such argument appellant cites Jacoby v. Peck, 23 Cal.App. 363, 138 P. 104, which in no respect is applicable. Jacoby had in a former suit sought recovery of matured installments on a contract for the sale of merchandise. Although subsequently maturing payments were due at the time of the first trial they were not and could not have been litigated then without a pleading that they were unpaid. The instant issue is settled by Code of Civil Procedure, sections 1908, 1962, subd. 6, 1963, subd. 18[2] and by Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387, wherein the defendant was barred from asserting defenses which he might have asserted in a former action.

The authorities cited by appellant, Verder v. American Loan Society, 1 Cal.2d 17, 32 P.2d 1081; Mailhes Investors Syndicate, 220 Cal. 735, 32 P.2d 610; Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9; Herdan v. Hanson, 182 Cal. 538, 189 P. 440; McGibbon v. Schmidt, 172 Cal. 770, 155 P. 460; Papenfus v. Webb Products Co., 48 Cal.App.2d 631, 120 P.2d 60; Dickinson v. Electric Corporation, 10 Cal.App.2d 207, 51 P.2d 205, are not pertinent. The Verder case is alien to the question here involved. In Mailhes v. Investors Syndicate there was no inconsistency between the unlawful detainer action brought first by the owner and its subsequent defense of its title. Pascoe v. Morrison was an action to reform and enforce an agreement for exchange of properties and in the alternative for damages. Plaintiff's abortive attempt to obtain an enforcement did not preclude his recovery of damages in the same case. Herdan v. Hanson held that a judgment of nonsuit merely leaves the parties "in the same relative position as before the action was commenced". [182 Cal. 538, 189 P. 442]. The judgment of nonsuit was not res judicata of plaintiff's subsequent action for damages on account of defendant's fraud in inducing the exchange. In McGibbon v. Schmidt plaintiff had sued to recover money paid on the purchase price of certain property and a nonsuit was entered against him for the reason that no rescission or other termination of the contract was established. He was not estopped by such judgment of nonsuit from later demanding specific performance. In Papenfus v. Webb Products Co., plaintiff had in a former action sought rescission of his contract with defendant. Recovery was denied him for the reason that rescission was not available under the circumstances of the case. But because rescission would have been inequitable plaintiff was not to be deprived of an available remedy, to wit, that apparently defendant held plaintiff's property in trust for him. "As he mistook his remedy in his former action the doctrine of election of remedies cannot bar this action." His second action was not inconsistent with his first.

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[2] Code of Civil Procedure, section 1908, "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * *

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

Section 1962. "The following presumptions, and no others, are deemed conclusive: * * *

"6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence; * * *."

Section 1963. "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * *

"18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them; * * * (1947)."

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

INDEPENDENT IRON WORKS, Inc. v. AMERICAN PRESIDENT LINES, Limited, et al.

Civ. 14195.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1949.

Hearing Granted Jan. 12, 1950.*

Action by Independent Iron Works, Inc., against American President Lines, Limited, and others, for adjudication that plaintiff was the owner and entitled to immediate possession of certain cable in possession of named defendant.

The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., granted motions of defendant Eastern Iron & Metals Company, Limited, and Max Peterman, etc., for change of venue, and the plaintiff appealed.

The District Court of Appeal, Bray, J., affirmed the order of the trial court.

1. Venue 🔑72

The right to change place of trial to the residence of a defendant must be determined according to the status of the defendant as disclosed by the pleadings when defendant first appeared in the action.

2. Venue 🔑22(3)

Where defendant steamship company's answer admitted that company had possession of cable claimed by plaintiff and that cable was also claimed by two codefendants and asked that ownership be determined and that court order the party adjudged to be the owner pay freight, storage and other charges, together with attorney fees and costs, the company was a mere stakeholder without any interest in the litigation that entitled it to have the case tried in the county of its residence.

3. Venue 🔑68

It may be shown by affidavits or otherwise that the resident defendant is not a real party in interest, although the complaint is sufficient.

4. Venue 🔑46

Improper joining of a resident defendant need not be intentional or fraudulent in order to enable non-resident defendants to change venue to county of their residence. Code Civ.Proc. § 395.

5. Venue 🔑22(3)

Where steamship company was a mere holder of shipment claimed by plaintiff and others, the possibility of a dispute over amount of freight charges, etc., was not sufficient to make company a party in interest as respects proper venue.

6. Venue 🔑22(1)

The right to have case tried in the county of one's residence is a substantial right that should not be taken away from one who has a real interest in the litigation merely because another who has only an incidental interest is joined as a defendant.

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Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, Caspar W. Weinberger, San Francisco, for appellant.

Balter & Balter, William E. Balter, Los Angeles, for respondents.

BRAY, Justice.

Plaintiff appeals from a superior court order granting the motion of defendants Eastern Iron & Metals Co., Ltd.[1] and Max Peterman, doing business as Economy Pipe & Supply Company[2] for change of venue from the City and County of San Francisco to the County of Los Angeles.

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[1] (Hereafter referred to as "Eastern")

* Subsequent opinion 221 P.2d 939.

[2] (Hereafter referred to as "Peterman")

Record.

Plaintiff sued defendants American President Lines, Ltd.[3] Eastern and Peterman, alleging that plaintiff was the owner of 31 reels of cable now in the possession of the President Lines, and that all defendants asserted claims therein adverse to plaintiff, and asked the court to adjudge that plaintiff is such owner and entitled to the immediate possession of the cable. President Lines filed an answer in which they set up that it was a Delaware corporation with its principal place of business in San Francisco. It admitted it now had possession of the cable at Wilmington, California, and alleged that the cable had been delivered to it in Honolulu under a bill of lading for delivery to Peterman at Los Angeles. It then set up other facts showing that the cable was now claimed by plaintiff and by defendants Eastern and Peterman. It stated that it could not safely determine ownership as between said claims, offered to deliver the cable into court, and asked the court to adjudge its ownership. It further alleged that it had a possessory lien on the cable for ocean freight, storage and other charges and asked the court to order the party to whom it determines the cable should be delivered, to pay it all charges together with costs and attorney's fees.[4]

Thereafter defendants Eastern and Peterman filed a demurrer and upon proper pleadings moved for a change of venue to Los Angeles county, the residence of both said defendants, on the grounds of their residence, and that President Lines was not a real party in interest, but merely a stakeholder. President Lines filed a counter affidavit in which it set up that by reason of its compliance with the laws of California, its place of residence is San Francisco. This fact is not disputed. The court granted the motion for change of venue. Plaintiff appealed. President Lines did not appeal.

Question Involved.

The sole question is whether President Lines has such interest in the litigation that the action must be tried in the county of its residence, rather than in the county of the non-resident defendants.

President Lines Mere Stakeholder.

It is obvious that President Lines has no real interest in the main controversy, namely, the ownership of the cable. It admits that it is holding it merely for delivery to the rightful owner, when the court has determined which party is such owner. President Lines is just a stakeholder.

[1, 2] The complaint[5] alleged that President Lines as well as the other defendants claimed an interest in the cable adverse to plaintiff. Had the court only the complaint before it, it would have been required to deny the motion. But "the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action." McClung v. Watt, 190 Cal. 155, 159, 211 P. 17, 19. At the time defendants Eastern and Peterman first appeared in the action it was apparent from the answer of President Lines that its status was merely that of a stakeholder. A stakeholder does not have such an interest in the litigation as to entitle it to have the case tried in the county of its residence. Smith v. Smith, 30 Cal.App.2d 70, 85 P.2d 473, was an action brought to recover moneys on a contract. A title company with whom certain corporate stock was deposited as security for payments called for in the contract was joined as a defendant. The court held that it was merely a stakeholder and hence did not have sufficient interest in the litigation to prevent a change of venue to the county of the nonresident defendant. Sayward v. Hough-

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[3] (Hereafter referred to as "President Lines")

[4] At oral argument plaintiff conceded that President Lines could not claim attorney's fees.

[5] All proceedings were had on the amended complaint, which will be referred to as the complaint.

ton, 82 Cal. 628, 23 P. 120, was an action brought against one Houghton for refusal to transfer to plaintiff certain shares of stock in an irrigating company which was also made a defendant, in violation of an agreement to do so. The court held, 82 Cal. at page 630, 23 P. at page 120: "There is nothing in the complaint showing, or tending to show, that the corporation defendant is in any sense interested in this action. So far as can be seen from reading the allegations of the complaint, the attitude of the defendant corporation toward its co-defendant Houghton and the plaintiff is one of absolute indifference. Quite as much so as any stake–holder could be between conflicting claimants to a fund, in his hands, to which he had no claim himself. Not having any interest in the action which can be affected in any degree by the result of a trial, it makes no difference to the corporation defendant where the action is tried." The following statement in the Houghton case applies in the case at bar: "The plaintiff might obtain all the relief he demands without making it [the irrigating company] a party." 82 Cal. at page 630, 23 P. at page 120.

The cases cited by plaintiff are not in point. McClung v. Watt, supra, 190 Cal. 155, 211 P. 17; Hellman v. Logan, 148 Cal. 58, 82 P. 848, and others cited, were decided upon the allegations of the complaint alone. There was no showing to the contrary of those allegations.

[3] Notwithstanding the sufficiency of the complaint it may be shown by affidavits or otherwise that the resident defendant is not a real party in interest. Sourbis v. Rhoads, 50 Cal.App. 98, 194 P. 521. In Denna v. Red River Lumber Co., 47 Cal. App.2d 235, 117 P.2d 689, although the complaint stated a cause of action against the resident corporation defendant the court took testimony on the motion for change of venue and held that there actually was no cause of action against it and granted the change of venue.

In Hellman v. Logan, supra, 148 Cal. 58, 82 P. 848, cited by plaintiff, there was a direct allegation that the resident corporation defendant claimed an interest in the stock which it held and which was the security for a promissory note executed by the other defendant. The Supreme Court pointed out that the action was brought not only for judgment on the promissory note against its maker and to foreclose the security, but also to have the claim of the corporation adjudicated. As it was alleged to be making a claim to the stock itself, it was an indispensable party.

The President Lines' answer shows that they have no interest other than that of a stakeholder. The fact that it is asking that the successful party be required to pay its charges, and that it be allowed its costs, does not make it a real party in interest. There apply generally in all stakeholder cases. While it alleges in the answer that it has a possessory lien on the cable for its charges, it does not ask that such lien be established. It merely prays that upon determination of the party to whom the cable ought to be delivered, said party be ordered to pay President Lines its charges. This would follow without a court order. The allowance of costs would be merely incidental to its appearance as a stakeholder in the litigation and its offer to deposit the cable in court. It does not make the President Lines a real party in interest.

[4] Plaintiff contends that in order to change the venue the court must find that plaintiff joined President Lines for the sole purpose of keeping the venue in the court where the suit was brought and that the court did not so find here. This contention has been answered in Modlin v. Walter's Fur Shop, 83 Cal.App.2d 384, at page 388, 188 P.2d 805, at page 807, where the court said: "It may be true that the pleadings in this case were insufficient to permit an inquiry whether the allegations with respect to the resident defendant were sham, but such is not the only possible ground for disregarding the residence of a codefendant in determining the proper place for trial of the action * * *. Section 395 of the Code of Civil Procedure mentions as a separate and distinct ground: 'If any person is improperly joined as a defendant.' Such improper joining need not be intentional or fraudulent."

While there are many instances in which the party in possession of property may have such a lien interest on it as to entitle him, in an action over the ownership and right to possession of it, to hold the venue in the county of his residence, the incidental character of President Lines' claim here distinguishes this case from such instances.

[5, 6] Even the possibility that a dispute might arise as to the amount of the charges is not sufficient to make the defendant a party in interest on the venue question. Such a dispute would be merely incidental to the main issue. The right to have the case tried in the county of his residence is a substantial right given a defendant and should not be taken away from one who has a real interest in the case merely because another who has only an incidental interest is joined as a defendant. The fact that the President Lines did not see fit to appeal from the order of transfer, indicates, to some extent, the mere incidentalness of their interest in the real issue, namely, the ownership of the cable.

The order is affirmed.

PETERS, P. J., and WARD, J., concur.

94 Cal.App.2d 625

HELM et ux. v. ZACHES et al.

Civ. 14080.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1949.

Hearing Denied Jan. 12, 1950.

Walter Helm and wife sued Paul Zaches and others to establish a resulting trust for plaintiffs in realty to which defendants held legal title.

From a judgment of the Superior Court of Monterey County, H. G. Jorgensen, J., for plaintiffs, defendants appealed.

The District Court of Appeal, Ward, J., affirmed the judgment, holding that the evidence supported the trial court's finding of a resulting trust.

1. Trusts 🔑63½

Proof of resulting trust in favor of person by or for whom payment of consideration for transfer of realty to another is made may be based on verbal agreement. Civ.Code, § 853.

2. Trusts 🔑89(1)

Proof of resulting trust must be unambiguous and convincing, but may be by indirect evidence consisting of acts, conduct, and surrounding circumstances.

3. Appeal and error 🔑1008(1)

Whether showing of resulting trust is clear and convincing is primarily question for trial court.

4. Trusts 🔑89(1)

Evidence supported finding of resulting trust in holders of legal title to realty for benefit of persons purchasing it with funds loaned by one defendant and borrowed by him from bank. Civ.Code, § 853.

5. Appeal and error 🔑1122(1)

In suit to establish resulting trust for plaintiffs in realty purchased with partnership funds loaned to plaintiffs by one partner and money borrowed by him from bank, finding that loan was subject to copartner's approval was immaterial, in absence of evidence as to whether such approval was given before lender purchased property for plaintiffs, as such finding was merely incidental to judgment for plaintiffs and appellate court could make contrary or additional finding on matter, if necessary. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

Campbell & McHarry, Monterey, for plaintiffs and respondents.

Russell Zaches, Monterey, Orrick, Dahlquist, Neff & Herrington, San Francisco, for defendants and appellants.

WARD, Justice.

This is an appeal by defendants from an order adjudging and decreeing that defendants hold legal title to certain real property in trust for plaintiffs, who as the true owners, are entitled to possession. Defendants are ordered and directed to execute and deliver a proper deed of conveyance of the property to plaintiffs upon the payment to defendants by plaintiffs of a specified sum, with interest, and the amount of taxes which had been paid by defendants on the property.

The complaint alleges a copartnership consisting of Paul Zaches and Harry Raine, and it is admitted they were doing business as Herald Printers and Publishers. It is also alleged that Clara D. Helm entered into an agreement with Harry Raine to make a loan to plaintiffs of funds necessary for the purchase of certain real property; that legal title to the property in accordance with the agreement was taken by the Herald company as security for the loan; and that Raine agreed to advance $1,800 as a down payment, and to borrow the balance of $2,700 from the Carmel Branch of the Monterey County Trust and Savings Bank, upon a promissory note secured by a deed of trust upon the property and providing for monthly payments upon principal and interest. The complaint further alleges "That the aforesaid agreement and the loan thereafter were made by defendant Harry Raine as a partner acting for and on behalf of the Herald Printers and were made subject to the approval thereof by defendant Paul Zaches, the other of said partners." The court, by reference to the allegations of the complaint, found that the agreement was made subject to the approval of Zaches.

The preliminary facts are substantially as follows: Clara Helm with her two children desired to live on the Monterey peninsula while her husband was with the armed forces overseas. She and her sister, defendant Mary Raine, with whom she was then living, were looking for a house to rent, but could find no suitable place where children were welcome, so they started looking for something to buy. Mrs. Helm did not have money for a down payment. When the house here involved was discovered her brother-in-law, Harry Raine, was asked to look at the property. He then told her that he would advance the money for the down payment of $1,800, borrowing from the bank on the credit of his business partnership, and it was understood that he would personally obtain a loan for the balance of the purchase price. There were two houses for sale by the same owner and the particular house decided upon was selected because it had a private bedroom and bath in the back which could be rented to repay the down payment loan. Mrs. Helm was to make the payments to the bank, and agreed to repay to her brother-in-law the amount of the down payment. She was told by Raine that she would have a "buyer's lease." At that time Raine was carrying on the business of the Herald Printers and Publishers while his partner, Zaches, was in the Army in the eastern part of the United States. In the beginning when the aforementioned discussion was had about buying the house, Raine had said that *his partner Zaches "might not go for" the loan of the down payment.* (Italics added.) Thereafter Raine went ahead and made the down payment of $1,800 and attended to all the financial arrangements. Raine never consulted Zaches until the purchase "was final and all over and done with." He did, however, tell Zaches about the transaction sometime during the same year that it was made. The evidence discloses that Mrs. Helm moved into possession of the property about September 1, 1943, and has lived there ever since; also that she made payments to the bank on the unpaid balance of the original purchase price and paid fire insurance premiums.

The evidence further shows the purchase of the home for $4,500. To finance the purchase Raine borrowed approximately $1,300 from the Monterey County Trust & Savings Bank on the credit of his partnership with defendant Zaches and added to this amount sufficient to make the down payment in an amount of $1,800. The balance of $2,700 was borrowed from the bank by Raine *personally* upon a note executed by him and his wife, secured by a deed of trust covering the property. The purchase was consummated on August 20, 1943, and subsequently Mrs. Helm moved into the house. Thereafter Raine and his wife conveyed a one-half undivided interest in the property to Zaches and his wife, which is referred to in the evidence as an accommodation transaction.

[1-4] The main issue is whether sufficient evidence was presented to establish facts necessary to declare that a resulting trust arose. "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Civ.Code, § 853. Proof of such a trust may be based upon a verbal agreement. 25 Cal.Jur. 185, Trusts, § 53. When it is necessary to show that a resulting trust exists the proof must be unambiguous and convincing. Gomez v. Cecena, 15 Cal. 2d 363, 101 P.2d 477; Baskett v. Crook, 86 Cal.App.2d 355, 195 P.2d 39. The proof, however, may be by indirect evidence consisting of acts, conduct and the surrounding circumstances. "[T]he question whether the showing is clear and convincing is primarily one for the trial court." Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, at page 173, 168 P.2d 946, 958; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. The finding in favor of a trust in the present case case is amply supported.

Mrs. Helm testified that Harry Raine agreed to lend her the money to purchase the property and that the word "rent" was never mentioned. However, she testified that Raine said Paul Zaches "might not go for" the loan of the down payment, and that she agreed to repay the amount advanced by Raine as the down payment and to pay the bank installments. Raine testified that he had told plaintiff the partnership would lend her the amount necessary to purchase the property conditional upon his partner's consent. The evidence discloses that this discussion took place before the delivery of the deed to Raine. There is no evidence that Raine communicated with Zaches before the purchase of the property was completed, to determine whether Zaches approved or disapproved the transaction. Furthermore, there is no evidence that if Zaches did not approve the loan Raine and Zaches would in fact hold the property as owners and that the Helms would assume the position of renters. The evidence presented justifies a conclusion that defendants held the property in trust for plaintiffs.

[5] The finding by reference to the allegations of the complaint that the loan was made by Harry Raine subject to the approval of his partner, Paul Zaches, is of no consequence, in view of the lack of evidence on the matter of Zaches' approval prior to the time that Raine purchased the property subject to the equitable obligation to retain the property for the Helms. Such approval was not made a part of the agreement. A resulting trust arose when Raine and his wife had the property transferred to them without intent to take the complete beneficial interest. The finding that the loan was made pursuant to the approval of Zaches is incidental to the judgment. It was merely a declaration of an issue raised by the pleadings. Furthermore, this court could make a finding contrary to or in addition to the trial court's finding in that respect if it were deemed necessary. Code Civ.Proc. § 956a; Calif. Const., art. VI, § 4-¾. Findings have been held incidental to the judgment. Millard v. Legion of Honor, 81 Cal. 340, 22 P. 864. The judgment herein indicates that all of the vital issues have been set at rest.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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94 Cal.App.2d 507

ANTHONY v. ANTHONY.

Civ. No. 17234.

District Court of Appeal, Second District,
Division 1, California.

Nov. 7, 1949.

Hearing Denied Jan. 4, 1950.

Margaret M. Anthony sued Myrtle Anthony, as administratrix of the estate of L. Vern Anthony, deceased, to recover payments due under a property settlement agreement.

The Superior Court of Los Angeles County, Alfred L. Bartlett, J., rendered judgment for the plaintiff, and defendant appealed.

The District Court of Appeal, White, P. J., affirmed the judgment, and held the obligation of the husband under the contract to make payments to plaintiff constituted a continuing charge on his estate after his death.

1. Husband and wife ⚷278(3)

Generally, a husband may, under a property settlement agreement, provide for periodic payments during life of wife so as to make such payments a continuing charge on his estate after his death.

2. Husband and wife ⚷279(4)

Where husband and wife entered into a property settlement agreement providing that husband was to pay certain amount to wife each week until her remarriage, and wife subsequently obtained divorce decree which made no reference to agreement, payments constituted a continuing charge on estate of husband after his death.

3. Divorce ⚷249(2)
Husband and wife ⚷281

In actions other than for divorce, property settlement contracts between husband and wife are judged by same rules as other contracts between persons occupying fiduciary relations, and, if valid, will be enforced, whereas in actions for divorce, where such contracts are pleaded, they are binding only when approved by court. Civ. Code, §§ 158, 159.

4. Husband and wife ⚷278(1)

Property settlement contracts between husband and wife are valid if untainted by fraud, collusion, and undue influence, and are not against good morals. Civ.Code, §§ 158, 159.

5. Divorce ⚷249(2)

Jurisdiction of a court to modify a property settlement is derived from its original jurisdiction in a divorce action.

6. Husband and wife ⚷279(4)

Although an order of court for payment of alimony terminates on death of either of the parties, such rule is not applicable to a property settlement agreement between husband and wife where performance consists simply of payment of money and where personal representatives can sufficiently perform all that deceased could have performed.

7. Evidence ⚷448

In action by former wife against estate of former husband to recover payments accrued after death of husband under a written property settlement agreement, evidence pertaining to nature of the division of property and value of assets divided under unambiguous agreement was inadmissible as an attempt to vary the terms of the written agreement. Code Civ.Proc. § 1856; Civ.Code, § 1639.

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Harry C. Cogen, Los Angeles, for appellant.

Carson B. Hubbard, Huntington Park, for respondent.

WHITE, Presiding Justice.

Respondent is the former wife of decedent, L. Vern Anthony. They began living separate and apart September 20, 1944, and a written property settlement agreement, dated November 3, 1945, was signed by them. The agreement contained the following recital: "Whereas, it is the desire of the parties hereto to make a complete and final settlement of all of their property, affect property now owned by the parties hereto, and property which may hereafter be acquired by either of them, and all rights and obligations either of the parties hereto may have one to the other for support, maintenance, alimony, attorney's fees or court costs." The agreement stated that both parties thereto had had advice of counsel but the name of decedent's counsel was in blank. Respondent testified that her attorney prepared the agreement.

Decedent by the agreement was to hold as his separate property a 1936 Ford sedan automobile and any United States War Savings Bonds and bank accounts in his possession or in his name.

The respondent by the agreement was to hold as her separate property two parcels of real property; all community household furniture and furnishings; a life insurance policy in the sum of $5,000 in which respondent and the minor child were named as beneficiaries, and another life insurance policy conditioned upon the change of beneficiary from respondent to L. Vern Anthony, Jr.; seven United States War Savings Bonds; and a 1940 Oldsmobile sedan. The agreement contained a further provision for the benefit of respondent upon which the present litigation is based: "Second Party herewith agrees to pay to First Party the sum of ~~forty dollars ($40)~~ thirty-five dollars ($35.00) L.V.A. M.A. per week for the support and maintenance of First Party until such time as First Party shall remarry; said payments to begin on the 6th day of November 1945; and continue on the 3rd days of each week thereafter. In addition to all other payments Second Party shall pay to First Party the sum of seven hundred dollars ($700) prior to the fifteenth (15th) day of December, 1945." The agreement also provided: "It is further understood and agreed that the terms and provisions of this Property Settlement Agreement may be incorporated in any decree of divorce which may hereafter be obtained by either party, and enforceable by contempt proceedings if necessary."

Subsequent to the execution of the agreement and on or about January 31, 1946, respondent obtained a decree of divorce in the state of Nevada. The decree of divorce made no reference to the property settlement agreement. The agreement was not presented to the Court and none of its provisions were incorporated in the decree.

Decedent made the $35 weekly payments according to the terms of the written agreement until January 7, 1947. He died January 29, 1947, and Myrtle Anthony, his widow, whom he married March 2, 1946, was appointed as administratrix of his estate. The estate was appraised at $7,569.03.

Subsequent to the date of death and within the time allowed by law, respondent filed her creditor's claim against the estate for the sum of $35 per week from January 7, 1947, to the date of filing such claim and for such additional amount as would accrue during the lifetime of the respondent or until she remarried. The claim was rejected by the administratrix of the estate for all amounts in excess of $140, the amount accrued from January 7, 1947, to the date of death. Respondent then filed this action on her rejected creditor's claim to recover $35 per week from the date of death for the remainder of her lifetime or until she remarried.

At the beginning of the trial, it was stipulated by both parties that respondent had remarried May 15, 1948, so the action became one to recover $35 per week from date of death to May 15, 1948. The court found for the respondent and rendered judgment for $2,515.81, being the sum of $35 per week from date of death to May 15, 1948, plus interest. Appellant has appealed from the whole of said judgment.

Appellant does not seek to set the agreement aside on the basis of fraud, collusion, undue influence or as contra bonos mores, nor does she contend that there is any ambiguity in the contract. She asserts that the periodic payments provided for in the agreement were intended by the parties in the nature of alimony and not as a division of property and therefore terminated on the death of the decedent. Respondent argues that a property settlement agreement which provides for periodic payments to the wife until she remarries, and which is not made a part of the divorce decree in any manner, is not subject to modification by the court in an action on the contract brought against the estate of the deceased husband, and the ordinary laws of contract should be followed.

During the trial, the court agreed with the respondent that the action being solely on the agreement itself and the appellant admitting there was no ambiguity, the evidence presented by appellant as to the nature of the periodic payment provision was inadmissible as an attempt to vary the terms of the written agreement. However, sufficient offer of proof was made for the record for purposes of review.

All of the cases cited by appellant in support of her contention are cases in which the divorce decree referred to a property settlement agreement or to a stipulation by the parties as to property division and alimony or the divorce decree alone made such provision. Inasmuch as the present action is confined to the contract alone, cases other than those involving in essence modification of divorce decrees must be considered.

[1] "Notwithstanding the contrariety of opinion, as to whether, under provisions in divorce decrees for regular periodic payments of alimony, the obligations thereunder survive the death of the husband and become binding on his estate, it is generally recognized that the husband may, under a separation agreement, provide for periodic payments during the life of the wife so as to make such payments a continuing charge on his estate after his death." 17 Am.Jur. 550.

While it is true no intent is specifically expressed in the agreement that the periodic payments were to be binding on the husband's estate, on the other hand the condition subsequent of the respondent's remarriage could not be held to have been contemplated as an event certain to happen before the death of decedent.

[2] We are satisfied that the agreement here in question was a binding executed contract between the parties. By it they settled their property interests upon a basis agreeable to both. It bears no relation to alimony and is to be construed according to the ordinary rules of contracts. In our opinion it continued to be a legal charge against the estate the same as any other unfilled contractual obligation of decedent at the time of death.

[3, 4] In the case now engaging our attention the property settlement agreement was in no sense made part of a divorce decree. While the approval of a divorce court is not required to make effective a valid contract settling property rights between married persons, Green v. Green, 66 Cal.App.2d 50, 56, 151 P.2d 679, the distinction between the rule governing in an action other than divorce and the one applicable to such contracts when presented to a divorce court is thus stated in Sanborn v. Sanborn, 3 Cal.App.2d 437, 441, 442, 39 P.2d 830, 832 (hearing denied by the Supreme Court): "There is a marked distinction between the rule which governs in an action, other than divorce, on a contract executed under authority of sections 158 and 159 of the Civil Code and the rule which governs such contracts when presented to a divorce court. In the former instance, they are judged by the same rules as any other ordinary contract between individuals occupying fiduciary relations, and, if found to be valid, are binding on the parties and are recognized and enforced by courts; while in the latter instance, because of the unlimited power vested in the divorce court to make disposition of community property and to award support, such contracts, when pleaded and relied upon, are not binding or conclusive on the divorce court until subjected to examination of the court in the divorce action and approved. Moog v. Moog, 203 Cal. 406, 264 P. 490. Contracts between husband and wife under the provisions of sections 158 and 159 of the Civil Code, being authorized by law, are valid if untainted by fraud, collusion, undue influence, or not contra bonos mores, or the like. Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Murray v. Murray, 28 Cal.App. 533 153 P. 248. It has never been held that to acquire and possess validity such contracts must necessarily first be approved by a divorce court. The effect of the decisions relied on by appellant is simply that, as against the power of the divorce court in the matter of disposition of community property and awarding support, such contracts have no effect or control in the divorce case until sanctioned and adopted by the court either in whole or in part. Such sanction, however, is not necessarily a prerequisite to validity of such an agreement when sued upon in an independent action to enforce its terms."

[5] It is fundamental that the jurisdiction of a court to modify a property settlement, even assuming that it could decide that what purported to be a property settlement agreement was meant and intended to be alimony, would be deprived from its original jurisdiction in the divorce action. Here, the property settlement agreement was never made part of a divorce decree.

As pointed out by respondent in her brief: "The action in the present case is one brought on a contract, and should not be confused with the law applicable to divorce. The question of a divorce is not involved in this litigation; therefore, the question of alimony cannot be involved in this litigation, since alimony is an order of court, an incident of divorce, and not a contract. There is no requirement that a divorce cannot be granted without a determination and settlement of the property rights of the parties and determination of their support and maintenance. A divorce is a dissolution of the contract of marriage by the judgment of a court of competent jurisdiction. Cal.Civ.Code, Sec. 90. Matters of property rights, alimony and support and maintenance are often settled in divorce actions, but none of such matters are within the issues of the pleadings of this case."

[6] Although an order of court for payment of alimony terminates upon the death of either of the parties, such rule is not applicable to an obligation under a contract, where performance consists simply of payment of money and where the personal representatives can sufficiently perform all the deceased could have performed. In such cases, the personal representative of the decedent is bound to fulfill and complete such a contract.

The contract pleaded by both parties in the case at bar should be "judged by the same rules as any other ordinary contract between individuals occupying fiduciary relations," Sanborn v. Sanborn, supra, and not by rules applicable to modification of divorce decrees. See, also, In re Estate of Caldwell, 129 Cal.App. 613, 19 P.2d 9.

[7] The terms of the contract now before us are clear. Concededly, there is no ambiguity therein. The contract was performed according to its terms by both parties without question, up to the time of L. Vern Anthony's death, and performance may be completed simply by a payment of money. Under familiar rules, the holding of the trial court that evidence pertaining to the nature of the division of property and the value of the assets divided was not admissible was correct. Civ.Code, sec. 1639; Code Civ.Proc., sec. 1856.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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94 Cal.App.2d 619

HAMILTON et al. v. MADISON AUTO SALES CO. et al.

Civ. 3857.

District Court of Appeal, Fourth District, California.

Nov. 15, 1949.

Rehearing Denied Dec. 9, 1949.

Action by John G. Hamilton and others against the Madison Auto Sales Company, a corporation; Warren L. Straign and F. M. Deason for personal injuries and property damages arising out of the collision of motor vehicles. Deason agreed to bring the truck involved from California to Mississippi under an agreement with the company and the truck involved in the accident was driven by Straign.

The Superior Court of Riverside County, Russell S. Waite, J., after a verdict against all three defendants granted a motion for judgment notwithstanding the verdict made by the company and the plaintiff appealed.

The District Court of Appeal, Mussell, J., reversed the judgment notwithstanding the verdict and affirmed the judgment entered upon the verdict of the jury limiting the recovery against the company to the liability imposed under the vehicle code, holding that plaintiffs adduced sufficient evidence to establish the liability of the company, but that the evidence established that Deason was an independent contractor and the employer of Straign.

1. Trial 🔑178

The trial court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiffs.

2. Evidence ⚷78

Where bill of sale was within the power of defendant to produce at trial, and it had a vital bearing on the issues involved, and defendant failed to produce it, the presumption arose that if produced, the bill would operate to the prejudice of defendant and support the contention of the plaintiffs.

3. Property ⚷9

Presumption obtains that things which a person possesses are owned by him, and that a person is the owner of property, from exercising acts of ownership over it. Code Civ.Proc. § 1963, subds. 11, 12.

4. Automobiles ⚷244(32)

Evidence that defendant, who agreed to bring trucks in California to dealer in Mississippi for mileage payments and incidental expenses was furnished with a bill of sale to the trucks, that truck involved in accident together with a bill of sale, was delivered to the dealer in Mississippi and that the dealer failed to offer any evidence as to ownership of the truck involved in the collision, and in view of presumptions of ownership, was sufficient for the jury to find that the dealer was the owner of the truck involved at the time of the accident. Code Civ.Proc. § 1963, subds. 11, 12; Vehicle Code, § 402.

5. Automobiles ⚷244(29)

Evidence that defendant contracting to move trucks in California to Mississippi was to be paid mileage, that he carried insurance and paid the drivers and all incidental expenses and had complete control over the movement of the trucks, established that he was a "independent contractor" and not an "agent", "servant" or "employee" of dealer to whom the trucks were to be delivered, as respects the liability of the dealer for the negligence of the defendant and its driver.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Independent Contractor", "Agent" and "Employee".

6. Master and servant ⚷318(1)

If the one who is to perform the service is subject to the control as to the manner of performance by the one for whom the service is rendered, he is an "employee" or "agent", but if he is not subject to control, but is engaged to produce a certain result by means and in a manner of his own choosing, he is an "independent contractor."

7. Automobiles ⚷249

Where evidence supported inference that truck involved in accident was owned by defendant dealer, to whom it was being transported under an agreement with an independent contractor who had exclusive control of the driver involved, the amount recoverable against the dealer for the injuries and damages involved in the accident was limited to that specified in the statute. Vehicle Code, § 402.

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Eugene S. Ives, Schell & Delamer, Los Angeles, for appellants.

Chase, Rotchford Downen & Chase, Richard T. Drukker, Los Angeles, for respondents.

MUSSELL, Justice.

Action for damages for personal injuries and property damage arising out of a collision of vehicles.

Defendant Madison Auto Sales Company of Jackson, Mississippi, through its agent, Rodney Henderson, contacted defendant F. M. Deason at Memphis, Tennessee, by telephone and Henderson stated that he had 125 trucks at the Naval Base at Oxnard, California, which he wanted uncrated and moved to Jackson, Mississippi. Deason agreed to bring the trucks to Jackson for the sum of fifteen cents per mile and to pay the drivers and all incidental expenses. Deason came to California and while he was moving a convoy of six of the trucks through Riverside County, one of them, being operated by defendant Warren L. Straign, collided with an automobile and trailer owned and operated by plaintiff John G. Hamilton. Plaintiffs, who were all riding in the Hamilton car at the time of the accident, commenced this action against the three named defendants, alleging, among other things, that the truck involved was owned by defendant Madison Auto Sales Company, and at the time of the accident was being driven by defendant Warren L. Straign, with the knowledge and consent of the defendant company; that at the said time Straign was the agent, servant and employee of the defendant company and was acting within the scope and course of said agency and employment; that at said time defendant Deason was the agent, servant and employee of the defendant company and was acting within the scope of said agency and employment.

A jury returned a verdict against all three defendants and assessed damages as follows: $150 in favor of plaintiff Bonnie Kay Hamilton~~;~~ $2,585 in favor of plaintiff Irene Hamilton; $11,901 to John Hamilton for personal injuries, doctor bills, medical expenses and loss of salary, together with $1,000 property damage.

The trial court granted a motion for judgment notwithstanding the verdict made by defendant Madison Auto Sales Company, hereinafter referred to as the "Company", and plaintiffs appeal from the judgment then entered in favor of the Company.

It is stipulated by the parties to this appeal:

"1. That there was evidence at the trial sufficient to establish negligence proximately contributing to the happening of the accident on the part of the defendant Warren L. Straign, the driver of the truck involved in the accident in this case.

"2. That the evidence did not establish as a matter of law that the plaintiffs, or any of them, were guilty of contributory negligence proximately contributing to the happening of said accident.

"3. That there was evidence at the trial as to the injuries and damages sustained by the plaintiffs and each of them, sufficient to support the verdict of the jury as to the amount of injuries and damages sustained by the plaintiffs and each of them.

"4. That the only questions involved in this appeal involve the sufficiency of the evidence to support the finding of liability on the part of the defendant Madison Auto Sales, Inc., for the said negligent conduct on the part of said Warren L. Straign."

[1, 2] In considering the agreed questions set forth in paragraph 4 of the stipulation, we are governed by the rule set forth in Burgess v. Cahill, 26 Cal.2d 320, 321, 322, 158 P.2d 393, 159 A.L.R. 1304, that a court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiffs. Viewing the evidence in accordance with the rule and considering first the question of liability based on the provisions of Section 402 of the Vehicle Code which provides in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages", it appears that there was no direct testimony as to the ownership of the truck involved. However, there was evidence that Deason was furnished with a bill of sale to all trucks moved; that the truck involved in the accident, together with the bill of sale thereto, was delivered by Deason to the Company at Jackson, Mississippi. Certified copies of the records of the State of Mississippi were admitted in evidence showing that the defendant Company was the dealer and owner of about 80 of the trucks delivered by Deason; that most of the vehicles were delivered at Jackson but some were taken to other points at the order of the Company. Deason testified

that he procured Mississippi dealer's licenses on some thirty of the trucks, including the one involved in the accident and that licenses were issued in his name, but that he could not recall the number of the truck involved. In this connection it should be noted that the defendant Company failed to offer any evidence at the trial as to the ownership of the truck involved in the collision. The bill of sale was delivered by Deason to the defendant Company at Jackson and the evidence indicates that it was within the power of the Company to produce it at the trial. Under such circumstances, the presumption arises that the evidence if produced would operate to its prejudice and support the contention of the plaintiffs that the Company in fact owned the vehicle. Tieman v. Red Top Cab Co., 117 Cal.App. 40, 46, 3 P.2d 381.

[3, 4] Moreover, proof on the part of the plaintiffs was aided by certain presumptions. It is presumed that things which a person possesses are owned by him and that a person is the owner of property from exercising acts of ownership over it. C.C.P., Sec. 1963, subs. 11 and 12; Nash v. Wright, 82 Cal.App.2d 467, 473, 186 P.2d 686. We conclude under the evidence and the presumptions referred to that the jury was entitled to draw the inference and find as a fact that the defendant Company was the owner of the truck in question at the time of the accident. Special interrogatories were submitted to the jury and it found specifically that the defendant Company was the owner of the truck involved. The evidence is clear that the defendant, Deason, had permission, both express and implied, to operate the vehicle for the owner. We conclude that plaintiffs established liability on the part of the defendant Company under the provisions of Section 402 of the Vehicle Code. Burgess v. Cahill, supra, 26 Cal.2d at page 323, 158 P.2d 393, 159 A.L.R. 1304; Stewart v. Norsigian, 64 Cal.App.2d 540, 547, 149 P.2d 46, 150 P.2d 554.

Plaintiffs contend that defendants Straign and Deason were the agents, servants and employees of defendant Company and that at the time of the accident they were acting within the scope of the agency and employment. We are unable to agree with this contention.

[5] The uncontradicted testimony and all reasonable inferences which may be drawn therefrom establish the relationship of Deason to the Company as that of an independent contractor. He was to be paid fifteen cents per mile to move the trucks. He carried insurance at a cost $4 per unit for every unit moved and workmen's compensation on his employees. He was required to pay the drivers and all incidental expenses. It is undisputed that Deason had complete control over the movement of the trucks, the routes to be taken, and the time and manner of the delivery; he obtained in his own name proper Mississippi license plates; he paid proper taxes for the privilege of moving the vehicles across the highways of various states, including California and Arizona; he supervised the activities of his employees in moving the trucks, including the making of rules for the payment of the cost of necessary repairs; he was in complete control of the operation of the vehicles upon the highways.

[6] The general rule applicable in the determination of the question as to whether Deason was the agent, servant or employee of the defendant Company or an independent contractor is as set forth in Anderson v. Badger, 84 Cal.App.2d 736, at page 741, 191 P.2d 768. It is there said that if the one who is to perform the service is subject to control as to the manner of performance by the one for whom the service is rendered he is an employee, or agent, whereas, if he is not subject to control but is engaged to produce a certain result by means and in a manner of his own choosing he is an independent contractor.

In Brooks v. Johnson, 22 Cal.App.2d 618, 72 P.2d 194, this court passed upon the question here presented where the facts were quite similar to those in the instant case. There an automobile dealer selling cars in San Diego engaged one Bert Vroom to bring automobiles purchased by the dealer at the factory in Detroit to San Diego for $65 per car. Vroom was to engage and pay the drivers and all expenses of the trip. The only arrangement made with Vroom as to the drivers was a request by Johnson that they be local San Diego men with families and that Vroom select capable drivers of reputable character. Johnson did not see or talk to any of the drivers about the trip and did not agree to or pay them anything. Johnson designated to Vroom the route he was to take and gave instructions as to when and where to change the oil in the cars. Webber, a driver hired by Vroom, was driving one of the cars involved in an accident. We there held that Johnson did not reserve to himself the right to control the operations of the convoy and that Vroom was the independent contractor and not the agent, servant or employee of Johnson and that Johnson was not liable for the negligence of Webber.

In the instant case the driver, Straign, was employed by Deason and was not the agent, servant or employee of the defendant Company. There is no intimation in the record that the Company had any right to terminate the contract with Deason before the cars were delivered at Jackson. The Company had no right of discharge and the contract was for the delivery of cars at the rate of fifteen cents per mile. The details of the conduct of the convoy were in the exclusive control of Deason. It follows that he was an independent contractor and not the agent, servant or employee of the Company.

[7] Since we have concluded that there was sufficient evidence to support an inference that the truck in question was owned by the Company, the judgment notwithstanding the verdict is reversed and the judgment entered upon the verdict of the jury is affirmed, limiting the amount recoverable against the defendant company to the liability imposed under Section 402 of the Vehicle Code, to wit: for the sum of $5,000 for personal injuries and $1,000 property damage in favor of plaintiff, John G. Hamilton; the sum of $2,585 in favor of Irene Hamilton, and the sum of $150 to Bonnie Kay Hamilton, and for costs, and the trial court is directed to enter judgment accordingly.

BARNARD, P. J., and GRIFFIN, J., concur.

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94 Cal.App.2d 723

RANSOM v. WALLACE.

Civ. 17141.

District Court of Appeal, Second District,
Division 1, California.
Nov. 21, 1949.

As Modified Nov. 22, 1949.

Suit by John H. Wallace against Rose Wallace, also known as Rosemary Wallace to set aside a deed and for an accounting. Plaintiff died after trial and Jack K. Ransom, as special administrator of the estate of John H. Wallace, deceased, was substituted as plaintiff.

The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment for plaintiff and defendant appealed.

The District Court of Appeal, Drapeau, J., held that suit was not barred by limitations and that evidence sustained finding that plaintiff was entitled to a reconveyance and an accounting and affirmed the judgment.

1. Deeds ⚷70(6)

Adopted daughter who cared for elderly father and took charge of his banking and business occupied a position of trust and confidence as affecting validity of deed by which father for love and affection conveyed his realty to daughter.

2. Witnesses ⚷206

Permitting attorney who prepared deed by which father for love and affection conveyed his realty to adopted daughter to testify as to directions of grantor and daughter concerning preparation of deed and grantor's declarations as to purpose of deed on theory that, since daughter was present at all times when grantor talked with attorney, there was no privilege as between grantor and his attorney, was improper.

3. Limitation of actions ⚷100(7)

Suit to set aside deed by which elderly grantor for love and affection conveyed his realty to adopted daughter was not barred by limitations, where suit was commenced within two weeks after grantor discovered he had conveyed property to daughter and a confidential relationship existed between grantor and daughter.

4. Deeds ⚷211(1, 2)

Evidence sustained finding that grantor was entitled to a reconveyance of the realty to adopted daughter and an accounting on ground that he did not have the necessary understanding of transaction to constitute the deed an outright conveyance and that parties intended at most to create a naked trust to prevent grantor from making some other disposition of the property.

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Sidney W. Kaufman, N. Stanley Leland, Los Angeles, for appellant.

William J. Currer, Jr., Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff and his sister maintained a home together for many years. Neither of them was married. They lived on a little peach farm near Modesto. They adopted two children, a girl named Rosemary and a boy named Anthony. They took care of the boy and girl as good parents should, sent them to school, and raised them to womanhood and manhood.

Plaintiff's sister died. Title to the farm was conveyed to him by her deed before her death. Then the girl left home and came to Los Angeles to make her way. The boy remained with the plaintiff for a time and tried to run the ranch until he found that it would not support two families. So, in turn, he left the old home to strike out for himself.

As time went on, the infirmities of age began to catch up with the plaintiff. He grew more and more feeble. In 1941 he fell very ill and had to go to the hospital in Modesto. Learning of his condition, the boy went to Modesto and brought the old gentleman to the boy's home in southern California, to live with the boy and his family.

This arrangement continued until a third grandchild was expected in Anthony's, the boy's, home. Then the adopted daughter, Rosemary, arranged for her father to live in an apartment close to where she lived. The testimony is in conflict whether this move was because of bad feeling between the old man and Anthony and Anthony's family. Rosemary testified that it was; Anthony that it was not.

[1] Rosemary undertook the care of her father. When he went to the apartment she rented for him he was eighty-two years of age, and feeble mentally and physically. She looked out for him, saw him every day, prepared his meals for him, bought his clothing, and took charge of his banking and business. All he did was to "back" checks payable to him, so that the money could be deposited in his account, and sign any papers she told him to. It goes without saying that this was a relationship of highest trust and confidence.

February 13, 1942, the father conveyed by deed for love and affection the Modesto property to the daughter. It is this conveyance which constitutes the subject of controversy in this law suit.

The father testified that he had no recollection of signing the deed; that he thought he had signed a power of attorney to enable the daughter the better to take care of his property. It is but fair to say that when he testified his memory was exceedingly vague, uncertain, and faulty. He was certain on one point, however, and that was that the Modesto ranch was his property and not his daughter's.

The daughter testified that her father gave her the ranch because he wanted her to have it, and because he did not want Anthony to have it. This testimony was corroborated by several friends of the daughter who testified that the old gentleman had told them he had given the ranch to her.

The daughter further testified that when her father told her he wanted to give her the ranch, she took him to her lawyer who had been taking care of other matters for her. This lawyer (who tried the case) and who was not any of counsel appearing on this appeal testified that the plaintiff said he wanted the property conveyed to his daughter; that he wrote a letter to the county recorder of Stanislaus county to secure the legal description; and that when the description was received the deed was prepared and forwarded by mail to the daughter. In this transaction counsel was acting for the old gentleman, and was his attorney.

[2] Over the objection of plaintiff, the lawyer witness was permitted to testify to the directions of the plaintiff and of the defendant concerning the preparation of the deed, to the declarations of the plaintiff as to the purpose of the deed, and as to counsel's impressions of the physical and mental condition of the plaintiff. This testimony was admitted because the daughter was present at all times when the old man talked with his lawyer, and the court ruled that there was no privilege as between the plaintiff and his lawyer. Such practice does not commend itself; it is highly dangerous, and is not approved. Such practice affords opportunity for the unscrupulous to manufacture a situation whereby a party represented by counsel may find himself later on confronted by the adverse testimony of his own lawyer.

When the plaintiff discovered that he had deeded the Modesta farm to his daughter, he called upon the son for help. The son, in the meantime, had moved to Sacramento. The son immediately came to Los Angeles, and took his father to Sacramento to live with him. Shortly thereafter suit was filed. the case was carefully tried and seriously considered by the trial judge. When all the testimony was in, a recess was taken for a week, so that the judge might read all of the exhibits. The contents of these exhibits undoubtedly materially influenced the decision. There are several letters among the exhibits, written by Rosemary, in which she made statements which convinced the court that the plaintiff did not have the necessary understanding of the transaction in 1942 to constitute the deed as an outright conveyance; and that, in any event, it was neither the intent nor the purpose of the parties that anything more than the bare legal title was being conveyed to the daughter. "She was managing it for Dad." She was holding it "as a naked trust to prevent him from making some other disposition of it."

Having come to these conclusions, the Court then took testimony for an accounting between the parties.

Findings were made that the plaintiff was entitled to a reconveyance of the property, and that the defendant was indebted to him in the amount of $9,456.89; and judgment followed; from which judgment defendant appeals.

After the trial the plaintiff died, and a special administrator was substituted in his place. For the purposes of this opinion the decedent has been and will be referred to as the "plaintiff."

Defendant grounds her appeal on two propositions: that plaintiff's cause of action was barred by the statute of limitations; and insufficiency of the evidence to support the findings.

[3] The first ground must fail because it is in testimony that plaintiff's action was filed within two weeks after he found out he had deeded the property to the daughter. Antonsen v. Pacific Container Co., 48 Cal.App.2d 535, 120 P.2d 148; Kallmeyer v. Poore, 52 Cal.App.2d 142, 125 P.2d 924. The confidential relations between the parties also supports the findings. 12 Cal.Jur. 799.

[4] The second ground must also fail. Substantial evidence is found to support the findings—the declarations of the defendant in her letters, the physical and mental condition of the father, his difficulty in reading and writing, or to see well, with or without glasses, the relationship of trust and confidence between the father and daughter, and the fact that the property conveyed was the only income property which plaintiff owned. Under the rules on

appeal which this Court is required to apply, the findings must be approved.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

94 Cal.App.2d 643

GOLDRING v. GOLDRING.

Civ. 16948.

District Court of Appeal, Second District,
Division 3, California.
Nov. 16, 1949.

Dorothy M. Goldring was granted a divorce decree in action against John E. Goldring and was awarded $249 a month for support of two minor children in accordance with a stipulation of the parties. Thereafter the defendant filed a motion to modify the award of support money.

The Superior Court of Los Angeles County, A. W. Ashburn, J., rendered an order denying the motion, and the defendant appealed.

The District Court of Appeal, Shinn, P. J., affirmed the order, holding that under the evidence the Superior Court did not abuse its discretion in refusing to modify the award.

1. Appeal and error 🔑760(2)

An appellant should state fully with transcript references the evidence which is claimed to be insufficient to support the findings, since appellate courts are not called on to make an independent search of the record.

2. Appeal and error 🔑760(2)

Respondent was not required to supply deficiencies in appellant's transcript references to evidence which appellant claimed was insufficient to support findings.

3. Appeal and error 🔑757(3)

The District Court of Appeal will disregard claims of insufficiency of the evidence, even though that be the only ground of appeal, where the appellant fails to make a satisfactory statement in the opening brief, or a supplement thereto, of evidence claimed to be insufficient, with transcript references.

4. Appeal and error 🔑996, 1012(1)

The credibility of witnesses, the weight to be accorded to their testimony, and inferences to be derived therefrom, are matters for trial court.

5. Divorce 🔑309

Mere fact that much of testimony of divorced husband on his motion for modification of award by divorce decree for support of children in accordance with stipulation of the parties was not directly contradicted or impeached did not require court to give it full credit.

6. Divorce 🔑309

A court is not required to modify an order for support of children of divorced parents, with every temporary change in the divorced husband's financial condition.

7. Divorce 🔑309

Though a divorced husband's inability to make payments for support of children as required by divorce decree is a factor normally to be considered on motion of divorced husband for modification of award for support, it is not a controlling issue.

8. Divorce 🔑309

Where original award in divorce decree for support of children was based on voluntary agreement of divorced husband, court was not required to modify the award except on a showing that divorced husband's inability to comply therewith had substantially decreased relative to the time of the decree.

9. Divorce 🔑309

The power of a court to modify orders regarding support of minor children of divorced parents is one of broad discretion and is peculiarly dependent on circumstances.

10. Divorce 🔑309

Denial of modification of award in divorce decree for support of children is not an abuse of discretion in absence of an acceptable showing that circumstances of the parties have materially changed from what they were when prior order was made.

11. Divorce ⚿309

Fact that since time of original divorce decree requiring divorced husband to pay $249 a month for support of children and $1 a month for alimony for a limited period, divorced wife found employment which paid her $232 a month, was of little significance, under the unusual circumstances, on motion by divorced husband for modification of the award for support.

12. Divorce ⚿309

Denial of divorced husband's motion to modify award in divorce decree of $249 a month to divorced wife for support of children in accordance with stipulation of the parties, on ground of change in husband's financial status was not an abuse of discretion under the evidence.

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Saul J. Bernard, Los Angeles, for appellant.

McLaughlin, McGinley & Hanson, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff obtained an interlocutory decree of divorce on October 8, 1947 on the ground of cruelty. The decree recites that by a stipulation entered into in open court "plaintiff and defendant stipulated and agreed as to all matters embodied in this decree except the matter of whether or not plaintiff should obtain an interlocutory decree of divorce." Custody of the two minor children of the marriage was awarded jointly to the parties, with the plaintiff to have physical custody and control at all times except on alternate week-ends and during two weeks of the summer vacation period. Plaintiff was awarded the home, subject to a trust deed in the sum of $6,630.00 which defendant was ordered to pay and discharge; most of the furnishings therein; certain other articles of furniture; a 1941 automobile; and an insurance policy on her life. It was decreed that, except for the foregoing specific properties awarded to her, in consideration of which plaintiff had released all claims to any other property, plaintiff had no right, title, or interest in any property or assets of defendant John E. Goldring, of Modernair Corporation, or of Modern Products, Ltd., a co-partnership. Defendant was ordered to pay "to the plaintiff the sum of Two Hundred Forty-nine Dollars ($249.00) per month for the support and maintenance of the said two minor children * * * until further order of the court," and in addition thereto the sum of $1.00 per month as alimony for a period of three years or until plaintiff's remarriage. No appeal was taken from the judgment.

On August 13, 1948, following a hearing which lasted two days, a different judge from the one who presided at the divorce trial denied defendant's motion to modify the award of support money. Defendant appeals from the order, contending that denial of his application was an abuse of discretion. Respondent contends to the contrary, but concedes that, although the provision for support of the children was part of a property settlement agreement, the court had jurisdiction to modify it upon a proper showing of changed circumstances. In view of this concession and our conclusion that the order must in any event be affirmed, we find it unnecessary to determine whether, or to what extent, the court may have had such jurisdiction. See Streeter v. Streeter, 67 Cal.App.2d 138, 142–144, 153 P.2d 441. Cf. Fields v. Fields, 94 Cal.App.2d 56, 209 P.2d 977.

Before passing to a consideration of the merits of the appeal we desire to issue a word of warning to attorneys. Unfortunately our remarks will probably miss the mark, since the practitioners we intend to reach are not those who make a practice of reading law.

[1-3] It is incumbent upon the appellant to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reports are replete with statements to the effect that the courts are not called upon to make an independent search of the record where the rule is ignored. We have

such a situation here. The appellant's brief of 7½ pages devotes 1½ pages to a statement of the evidence. It refers to the evidence most favorable to appellant, with proper transcript citations, but goes no further. No attempt whatever has been made to point out evidence tending to prove that a material change in defendant's financial condition had taken place after the decree was rendered. The general statement of the evidence given at the hearing is inaccurate, incomplete and misleading. It was not incumbent upon plaintiff to supply the deficiencies and she has not done so. Nevertheless we have seen fit to make a thorough study of the transcript of the evidence instead of affirming the order summarily. This because we have not heretofore announced an intention to adhere to the rule above stated. But we do now give notice that henceforth it will be the practice of this court to disregard claims of insufficiency of the evidence even though that be the only ground of appeal, where the appellant has failed to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed to be insufficient, with transcript references. Counsel who ignore the rule may expect affirmance of the judgment or order appealed from in proper cases.

The only evidence pertaining to the status of defendant's finances consists of his own testimony and that of his business associate, C. S. Vaughn, plus certain documentary exhibits. As disclosed by that evidence, assuming it worthy of full credibility, we think the following is a fair statement of his finances at the time of the decree. He was the principal stockholder and an officer of Modernair Corporation, and entitled to a salary of $200 per month. The salary was not paid to him consistently, however. He had some additional income from securities, most of which was required to pay the interest on loans for which, as hereafter appears, such securities were pledged as collateral. On October 6, 1947, his checking account showed a favorable balance of $525.25, and his savings account $30.37. By the decree, defendant was awarded the sole ownership of the assets of Modern Products, Ltd., a partnership formerly composed of him and his wife. Prior to the divorce trial, these entire assets had been sold to Modernair for a price of about $37,000, some $16,500 of which was paid in cash to liquidate all of Modern Products' debts except an indebtedness of $1,900 which was assumed by defendant. At the time of the stipulation, the balance of $20,496.93 due on the purchase price was still owing to Modern Products Ltd. (i. e. to defendant) from Modernair. Between October 1946 and September 1947, entirely apart from the Modern Products purchase, defendant had invested in Modernair Corporation about $74,000, much of which had been raised by secured loans: $16,500 had been borrowed from the Bank of America, $21,000 from the Canadian Bank of Commerce in San Francisco, and $10,000 from his sister, Mrs. Natcher. Defendant had been issued 950½ out of a total of 1978 outstanding shares of Modernair stock of $50 par value, and a receipt for $26,875.00 authorizing the issuance to him of 537½ additional shares as soon as a permit therefor was received from the Corporation Commissioner. The only other shareholders were C. S. Vaughn (597½ shares) and defendant's mother (430 shares). Defendant, about the time of the divorce trial, borrowed $10,000 from Vaughn, upon the security of certain bonds, which sum he invested in stock of the Vaughn Manufacturing Co. on October 6, 1947, in order to pay attorney's fees, costs, and sums awarded by the decree, he borrowed $10,000 from the Canadian Bank of Commerce in Los Angeles, secured in part by stocks owned by him, and in part by certain securities which he borrowed from his mother, in return for which he later pledged with her his newly acquired Vaughn stock. As a term of the property settlement agreement, defendant assumed a $3,500 debt owing from plaintiff to defendant's mother, and as security therefor pledged some 413 shares of his Modernair stock. The rest of his issued Modernair stock had already been pledged as collateral for the loan from his sister. The only unencumbered securities which he then held were certain shares in Celanese Corporation of Canada worth about $1,250. As previously noted, he was obligated by the stipulation and decree to make the monthly payments necessary to discharge the trust deed on the home.

At the time of the hearing below, in August 1948, the status of defendant's finances may be summarized as follows. He was still entitled to the salary of $200 per month from Modernair, but had not been paid for some six months. His other income was negligible. His savings account showed a balance of $.12 as of March 22, 1948, and his checking account had been closed out on March 25, 1948. He had not paid anything on the $1,900 indebtedness of Modern Products, Ltd., nor had Modernair paid him any part of the $20,496.93 which it owed on the purchase price of Modern Products' assets. The $16,500 Bank of America loan had been discharged by sale of the collateral, as had the $21,000 loan from the San Francisco branch of the Canadian Bank of Commerce, and the $10,000 loan from C. S. Vaughn. He still owed $9,000 to Mrs. Natcher, $9,500 to the Los Angeles branch of the Canadian Bank of Commerce, some $6,100 upon the trust deed, and the full $3,500 debt to his mother which he had assumed. His Celanese stock had been pledged with his mother as additional security for the last mentioned obligation in June 1948, and he no longer owned any unencumbered stocks or bonds. He testified to a debt of some $600 owing on a note which he had executed to his mother for cost of room and board while living with her subsequent to September, 1946. The evidence does not disclose whether this note was executed prior to the divorce trial or not, nor what proportion of the $600 was allocable to costs incurred prior and subsequent thereto. He also owed an unspecified amount for medical services incurred in a recent illness, part of the total expenses of which had been met by hospital insurance proceeds. Finally, although he listed as a liability an annual premium due on life insurance in the amount of $696.60, he testified that he had made arrangements in May, 1948 to have the loan value of the policy pay the premium rather than have the policy lapse.

From defendant's evidence it would appear that the chief changes in his circumstances since the time of the decree consisted of: (1) The complete cessation of the theretofore irregular payments of salary; (2) the elimination of three major items of liability, with an accompanying reduction in total assets, by the sale of collateral securing the said three loans; (3) the partial reduction of certain other liabilities; (4) the exhaustion of his bank accounts and hypothecation of his last remaining unencumbered securities; and (5) the incurring of an undisclosed, but presumably not very large amount of additional indebtedness.

[4, 5] Defendant contends that upon this showing, he was entitled to a modification of the decree as a matter of law. He assumes that the court was required to believe his testimony and that of his only other witness, Vaughn. He ignores the rule that the credibility of witnesses, the weight to be accorded to their testimony, and the inferences to be derived therefrom, are matters for the trial court. The mere fact that much of defendant's testimony was not directly contradicted or impeached did not require the court to give it full credit. An examination of defendant's testimony discloses that it is highly unsatisfactory, and is beset with inconsistencies, vagueness, and ambiguity. On the whole, it presents serious questions of fact as to the actual nature and extent of defendant's assets, and as to his good faith in their management. A few examples will suffice to illustrate the point: (1) Although defendant testified that he was receiving no salary and little other income, his personal living expenses amounted to more than $180 per month, including a $75 per month apartment. Moreover, he stated that he was willing to pay $100 per month for support of his children, and that he would keep up the payments on the home; (2) in June 1948, purportedly at the request of his mother, defendant pledged with her his 50 unencumbered shares in Celanese Corporation of Canada, as additional security for his debt to her of $3,500. This debt was already secured by 413 shares of Modernair stock for which defendant had paid a total price of $20,650, and which had a book value, as of May 15, 1948, of over $11,000, according to Modernair's balance sheet; (3) defendant testified that at the time the decree was rendered, Modernair was only "in a little more favorable position than it is at the present"; and that its net worth in May 1948 was about $95,000. Examination of Modernair's balance sheet in evidence discloses that as of May 15, 1948, it had total assets of $150,000. Its current assets consisted of cash in the amount of $4,000, notes and accounts receivable totaling some $29,000, and a merchandise inventory of over $49,000; whereas its current liabilities to persons other than defendant and Vaughn, who were also its chief stockholders, totaled less than $23,000; (4) although defendant testified that bonds of a face value of $19,000 pledged with the Bank of America had been sold to discharge the $16,500 loan, there was no evidence as to what the unpaid balance was at the time of sale, nor what the proceeds of sale amounted to; and defendant merely produced a sales slip of a private broker evidencing sale of only $2,000 worth of said bonds at about the time of the purported sale of collateral; (5) defendant was unable to account for certain deposits to his credit appearing upon his bank's ledger sheets, totaling over $3,000, in January 1948; (6) defendant was in possession of a receipt for advances totaling $26,875 to Modernair, for which 537½ shares of stock were authorized to be issued to him as soon as a permit to do so was received from the Corporation Commissioner. The receipt was dated March 12, 1947. As of the hearing in August 1948, the shares had not been issued, and the delay is not explained in the record. Furthermore, Modernair's balance sheet listed only $22,742.64 as the total of "advances by officers and stockholders." A substantial part of this sum had been advanced by C. S. Vaughn, according to his testimony.

The foregoing is not intended to be, nor is it, a complete statement of the questionable aspects of defendant's testimony. Many other dubious features of a similar nature abound throughout. It was, of course, within the power of the court to find the facts as they were represented by defendant, and to resolve all doubts in his favor. But it was not bound to do so as a matter of law. To reach a contrary decision would require this court to exceed its lawful jurisdiction by retrying the case on its facts.

[6] Defendant's claim of inability to comply with the terms of the decree would seem to have substantial support in his testimony and that of Vaughn that the business of Modernair has fallen off materially and that it has been operating at a loss. Granting that this is true it nevertheless appears that it is a meritorious business, and that the conditions from which it has suffered, including strikes against suppliers of material, need not necessarily recur. The court is not required to modify an order for support of children with every temporary change in the father's financial condition.

[7-10] We deem it appropriate, also, to point out that defendant, as part of the property settlement contract, agreed to the payments as ordered by the decree, at a time when his ability to meet them might well have been seriously questioned. Although a father's inability to make support payments is a factor normally to be considered, Lufkin v. Lufkin, 209 Cal. 710, 716–717, 290 P. 8, it was by no means a controlling issue in the present proceeding. In view of the fact that the original award was based upon defendant's voluntary agreement, it would seem to follow that the court was not required to modify it except upon a showing that defendant's ability to comply therewith had substantially decreased relative to the time of the decree. To hold otherwise would unwarrantedly deprive plaintiff of the fruits of her bargain, and open the door to fraud. The power to modify orders regarding support of minor children of divorced parents is one of broad discretion and is peculiarly dependent upon circumstances. It cannot be deemed an abuse of discretion to deny modification in the absence of an

acceptable showing that the circumstances of the parties have materially changed from what they were when the prior order was made. See Williams v. Williams, 80 Cal.App.2d 28, 181 P.2d 110; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654.

[11, 12] Furthermore, we think it of little significance, in view of the rather unusual circumstances of the case, that since the original decree was entered, plaintiff had found employment and at the time of the hearing was receiving an income of $232 per month. The decree awarded her $249 per month for support of the children, but only $1.00 per month for alimony for a limited period. Clearly it was contemplated that plaintiff, who received no income producing property whatsoever by the decree, would become employed. That being an implied condition of the award, its fulfillment will not be readily construed to plaintiff's disadvantage. Moreover, there was evidence from which it could be inferred that plaintiff's living expenses had substantially increased and that a reduction in the amount of the support payments would be detrimental to the welfare of the children. We are satisfied that the denial of defendant's petition for modification was not an abuse of discretion.

The portion of the order from which the appeal is taken is affirmed.

WOOD and VALLÉE, JJ., concur.

94 Cal.App.2d 662

ROSE et al. v. HECHT et al. (two cases).

Civ. 17043, 17044.

District Court of Appeal, Second District,
Division 2, California.

Nov. 17, 1949.

Hearing Denied Jan. 12, 1950.

Actions by Zelletta M. Rose and Lori, Limited, Incorporated, against Ben Hecht and Jacque Gustave Salomon, doing business under the fictitious firm name of Monarch Hotels Operating Company of California, and others, to recover the reasonable value of the use and occupation of certain hotel property.

The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgments for the plaintiffs and allowed accrued interest at seven per cent per annum on the judgments, and the defendants Ben Hecht and Jacque Gustave Salomon, doing business under the fictitious firm name of Monarch Hotels Operating Company of California, and Ben Hecht appealed from the awards of interest on the judgments.

The District Court of Appeal, Moore, P. J., held that the tender of each instalment of rental by defendants and rejection thereof by plaintiffs entitled defendants to be relieved of the interest charges, and ordered that the judgments be modified, and as modified affirmed the judgments.

1. Interest 🔑50

Where landlord refused to accept tender of each instalment of rental offered by assignees of lease, and landlord sued for reasonable value and use of premises, assignees were relieved of interest charges on the rentals. Civ.Code, §§ 1501, 1504, 1511, 1512, 1515; Code Civ.Proc. § 2076.

2. Interest 🔑50

Where a creditor declines to negotiate with his debtor concerning offer of payment and without making objection to the form of tender or inquiring as to debtor's ability to pay the obligation, but merely refuses to consider the offer to pay, it may be assumed that any further attempt by the debtor would be met with rebuff and in such event the indebtedness ceases to bear interest. Civ.Code, §§ 1501, 1504, 1511, 1512, 1515.

3. Interest 🔑50

Although tender of monthly rentals by assignees to landlord by personal checks without depositing in a bank the amount of the rentals to the landlord's credit does not extinguish the obligation, such tenders are sufficient to stop the running of interest. Civ.Code, §§ 1501, 1504, 1511, 1512, 1515.

4. Interest ⚷50

A valid tender, made by a defendant pending plaintiff's appeal from a judgment, of the full amount of the judgment and of costs to date of tender, stops interest on judgment from that moment.

5. Interests ⚷39(3)

Where lease and assignment under which assignees occupied premises were valid, and assignees were liable for rent under terms of lease, but landlord based action for sum allegedly due on reasonable value of use and occupation of premises, demand was for unliquidated amount and could not draw interest until claim had been reduced to judgment.

6. Landlord and tenant ⚷238

Where assignees of lease faithfully complied with lease, but landlord refused to accept tender of rental by assignees, and brought action for reasonable value of use and occupation of premises, landlord was not entitled to court costs.

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Benjamin J. Goodman, Los Angeles, for appellants.

A. Brigham Rose, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the actual tender of payment of an instalment of rent stops the running of interest as of the date of the tender.

On February 15, 1944, respondents leased their hotel property to one Wolfe and his wife for a term of five years. The rental to be paid was $1225 per month with an election to take in lieu of the fixed sum, 30 per cent of the rent revenue from the hotel. The date when such election could be exercised was not definite. As soon as the lease was assigned to appellants respondents refused to acknowledge the validity thereof and in April, 1945, instituted an action against the Wolfes to reform the lease, and appellants were joined as defendants. Final judgment denying reformation was not entered until after the order of submission of the instant actions, Lori, Ltd., v. Wolfe, 85 Cal.App.2d 54, 192 P.2d 112. However, despite the facts (1) that judgment denying such relief by the trial court had been entered, (2) that there was no covenant against assignments of the lease and (3) that appellants had tendered all payments of rentals provided thereby to be paid on December 24, 1945, respondents sued appellants asserting a nuisance, breach of lease and demanded payment of rents. In this they failed. On January 4, 1946, they commenced a series of six legal actions against appellants for rents due and in each instance attached appellants' bank accounts. At the time of the levy of each writ the bank held sums far in excess of the amount demanded and respondents held appellants' checks on the same banks for the sums due according to the lease. When appellants surrendered possession, June 15, 1947, their funds in the banks under attachment totaled $49,454.63, while respondents had received checks aggregating $48,312.20, drawn on the very accounts which had been attached. Each check had been tendered in payment of rent for a definite period and their total was the amount of rent that had been earned under the lease. Only the last two actions filed are involved herein. The first of these was filed March 31, 1947; and was for "the reasonable value of the use and occupation of the premises" from February 15 to December 14, 1946, and demanded $23,633.44. It alleged that defendants had offered to pay the sum of $23,633.44 for the period in question but that plaintiffs "were in a dilema and could not accept it without prejudicing their rights." The second of the instant actions was filed August 1, 1947, and was based on six checks theretofore issued by appellants to respondents. The sum demanded was $12,178.67.[1]

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[1] At the time of trial of the two instant actions there was pending the lawsuit filed May 2, 1946, for the rent from April 15, 1945, to April 30, 1946, in the sum of $20,000. The reason for the court's refusal to consolidate it with the present cases for trial does not appear.

Judgments were rendered for the principal sums of $22,633.44[2] and $12,178.76 and for accrued interest at 7 per cent per annum on the two amounts, to wit, $3,234.68 and $1,243.33, respectively. The instant appeals are taken from the two awards of interest.

Appellants contend that their due and faithful tender of each installment of rental and the rejection thereof by respondents entitle them to be relieved of the interest charges. Such contention is well supported by the evidence and conforms with the law. That at no time did respondents acknowledge appellants as their tenants is shown by respondents' numerous letters. The testimony of appellants proves that they offered their own checks and cashier's checks in payment of all accrued rentals and that no offer was ever refused on account of the form of the tender. When checks were rejected, cash was vainly offered in the full amounts. As respondents attached for the accrued rentals for the successive periods appellants issued their checks to respondents for the sums due. Thereupon, appellants requested them to release the attachment so that their checks would be honored. Such requests were without avail. When two cashier's checks were received by respondents in 1945, respondents returned them with the statement that they did not recognize appellants as "indebted to them in any manner or in any respect for the payment of rent or otherwise." Respondents' counsel admitted that the checks were periodically sent to him by appellants. Henry Schaefer, attorney for E. E. Wolfe, testified that in the presence of Judge Scheinman he offered to pay attorney Rose, agent for respondents, all rents due at the time and he offered to enter into a stipulation that respondents by accepting the rents would not yield their claims or contentions in the pending actions for reformation and unlawful detainer. Mr. Rose declined for fear that such a stipulation would prejudice respondents or that it would alter their position.

[1] The statutory law clearly supports appellants' contention that they owe no interest on the rentals by reason of their offers to pay and their actual tenders of checks for the amounts due. An offer of payment stops the running of interest on the obligation. Civ.Code, sec. 1504. All objections to a tender by personal check, cashier's check or by money are waived by the creditor if not then stated. Code Civ.Proc., sec. 2076; Civ.Code, sec. 1501. Failure to pay a debt that is due is excused when payment thereof is prevented by act of the creditor. Civ.Code, sec. 1511. If the payment of a past due debt is prevented by the creditor, the obligor is entitled to all the benefits to which he would be entitled had the payment been accepted by the obligee. Civ.Code, sec. 1512. A refusal by a creditor to accept money due him before an offer thereof is equivalent to an offer and refusal. Civ.Code, sec. 1515.

[2-4] The courts have clarified and emphasized such statutes. Where a creditor declines to negotiate with his debtor concerning an offer of payment and without making objection to the form of the tender or inquiring as to the latter's ability to pay the obligation, but merely refuses to consider the offer to pay, it may be assumed that any further attempt by the latter would meet with like rebuff. In such event, the indebtedness ceases to bear interest. Beeler v. American Trust Company, 24 Cal.2d 1, 3, 29, 147 P.2d 583; Stein v. Leeman, 161 Cal. 502, 119 P. 663; Hunt v. Mahoney, 82 Cal.App.2d 540, 546, 187 P.2d 43. While tenders of monthly rentals by personal checks without depositing in a bank the amount thereof to the lessor's credit does not extinguish the obligation, such tenders are sufficient to stop the running of interest. Walker v. Houston, 215 Cal. 742, 745, 12 P.2d 952, 87 A.L.R. 937; Marshall v. Hilton, 209 Cal. 531, 534, 289 P. 165; Webb v. Jones, 88 Cal.App. 20, 263 P. 538; Wagner v. Shoemaker, 29 Cal.App.2d 654, 655, 656, 85 P.2d 229. A valid tender, made by a defendant pending plaintiff's appeal from the judgment, of the full amount of the judgment and costs to date of tender, stops

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[2] Appellants had been awarded $1000 on their counter claim.

interest from that moment. Ferrea v. Tubbs, 125 Cal. 687, 689, 58 P. 308.

[5, 6] Although it was determined in Lori, Ltd., v. Wolfe, 85 Cal.App.2d 54, 192 P.2d 112, that the lease and the assignment under which appellants occupied the premises are valid, making appellants liable for rent under the terms of the lease, yet respondents based their action for $23,633.44 upon the reasonable value of the use and occupation of the hotel. This was a demand for an unliquidated amount and could not draw interest until the claim had been reduced to judgment. Stockton Morris Plan Co. v. Carpenter, 18 Cal.App.2d 205, 213, 63 P.2d 859. In view of the terms of the lease and its assignment to appellants and their faithful compliance with its terms there was no basis for the award of court costs to respondents.

It is therefore ordered that the judgments be modified by striking from each of them the award of interest and costs and as so modified they are affirmed, appellant to recover costs on appeal.

McCOMB and WILSON, JJ., concur.

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94 Cal.App.2d 740

PEOPLE v. FRANK.

Cr. 4391.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1949.

Hearing Denied Dec. 19, 1949.

Norman Morton Frank was convicted of contributing to the delinquency of a minor.

The Superior Court of Los Angeles County, A. A. Scott, J., rendered an order granting defendant probation with conditions, and he appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment, and held that the granting of probation subject to the condition that defendant could not practice medicine during the probation period was not an abuse of discretion.

1. Criminal law ⚷1001

Granting or withholding of probation is a matter that rests entirely within discretion of trial court.

2. Criminal law ⚷1001

Probation is not a right which is given to a defendant in a criminal proceeding who has either pleaded guilty to commission of offense or has been duly convicted thereof, but is an act of grace granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted.

3. Criminal law ⚷1001

The right of a defendant to refuse probation is a necessary safeguard against the possibility that the conditions of probation may be more onerous than the sentence, and the power of the trial court to impose conditions of probation is great.

4. Criminal law ⚷1001

Where defendant pleaded guilty to commission of a lewd and lascivious act on the person of a 10 year old girl, who at the time was in a plaster cast, trial court did not abuse discretion in granting probation subject to condition that defendant could not practice medicine during probation period. Welfare and Institutions Code, § 702.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Henry A. Dietz, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

Defendant was charged by information with constributing to the delinquency of a minor, section 702, Welfare and Institutions Code, a misdemeanor. He waived preliminary hearing and pleaded "guilty as charged in the information as deemed filed." He also waived time for sentence and applied for probation. Thereafter, the court pronounced judgment and sentence as follows:

"Defendant is sentenced to the County Jail * * * for the term of one year. Execution of sentence is suspended and Defendant granted probation for a period of five years under the following conditions: Defendant must serve the first nine months of his probationary period in the County Jail with good time allowed, if earned. County Road Camp is recommended. Defendant is not to practice medicine while on probation."

While defendant in pro per appeals from the order granting probation, that order is contained in and made a part of the judgment of the trial court imposing sentence; hence it will be assumed that this appeal is from such judgment.

It is here urged that the condition prohibiting appellant from the practice of medicine while on probation is unreasonable and beyond the power of the trial judge to invoke.

Appellant pleaded guilty to the commission of a lewd and lascivious act upon the person of a ten year old girl, who at the time was in a plaster cast. The record discloses that appellant was a pediatrician and that two psychiatrists were appointed to examine him in connection with another matter arising out of the instant transaction but which has since been dropped.

Appellant was prosecuted under section 702 of the Welfare and Institutions Code which provides: "The juvenile court shall have original jurisdiction over all misdemeanors defined in this section, and in all prosecutions hereunder, shall cause the defendant to be duly arraigned, and plead to the charge made against him in the manner provided in the Penal Code upon an indictment or information. In all cases where the defendant prosecuted under this section enters a plea of guilty, the juvenile court shall have jurisdiction to impose sentence or in its discretion to grant probation upon such terms as it deems proper."

In People v. Blankenship, 16 Cal.App.2d 606, 609, 610, 61 P.2d 352, 353, wherein defendant pleaded guilty to the crime of rape and was granted probation upon condition that he submit to a vasectomy, it was contended that this was an unreasonable condition to be imposed as a prerequisite for probation.

[1–3] The court there held otherwise, and enunciated some of the fundamental principles relating to the matter of probation:

"It must, in the first place, be conceded that the granting or witholding of probation is a matter that rests entirely in the sound discretion of the trial court. Sec. 1203, Pen.Code; People v. Judson, 128 Cal.App. 768, 774, 18 P.2d 379. In the second place, probation is not a right which is given to a defendant in a criminal proceeding who has either pleaded guilty to the commission of an offense or has been duly convicted thereof. It is 'an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted.' People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16; People v. Payne, 106 Cal.App. 609, 613, 289 P. 909 [911]. The only right which an applicant for probation possesses is that his petition shall receive consideration by the court. He may not demand clemency as a matter of right. People v. Roach, 139 Cal. App. 384, 387, 33 P.2d 895. * * *

"In conclusion, it may be remarked that appellant was not compelled by the condition which the court imposed to submit to an operation whose effect would be to foreclose him from procreation. He was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline to submit to the operation and accept the penalty which the law provides as punishment for his offense. It is our conclusion that under the circumstances here presented the condition was neither unreasonable nor improper, and that the trial court committed no abuse of discretion in imposing it."

See, also, People v. Billingsley, 59 Cal. App.2d Supp. 845, 849, 139 P.2d 362, 364, where it is stated: "The right of a defendant to refuse probation is a necessary safeguard against the possibility that the conditions of probation may be more onerous than the sentence. The power of the court to impose conditions of probation is very great."

That the trial court considered this one of the most aggravated cases that had ever come before him is evidenced by his comments at the time he placed appellant on probation and imposed the condition here excepted to.

[4] In view of the circumstances presented by the record herein, there was no abuse of discretion on the part of the trial court in granting probation subject to conditions.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

94 Cal.App.2d 651

SVISTUNOFF et al. v. SVISTUNOFF.

Civ. 14071.

District Court of Appeal, First District,
Division 2, California.
Nov. 17, 1949.

Hearing Denied Jan. 12, 1950.

Michael Svistunoff and wife sued Peter Svistunoff for specific performance of defendant's oral promise to reconvey to plaintiffs realty conveyed by them to defendant.

From a judgment of the Superior Court of the City and County of San Francisco, Sylvain J. Lazarus, J., for plaintiffs, defendant appealed.

The District Court of Appeal, Dooling, J., affirmed the judgment, holding that the facts pleaded in the complaint and found by the trial court supported his finding that the property was held by defendant in trust for plaintiffs and that the evidence supported the trial court's findings of defendant's oral promise to reconvey the property to plaintiffs and existence of a confidential relationship between the parties.

1. Trusts 🔑96

In parents' action against their son for specific performance of his oral promise to reconvey to plaintiffs realty conveyed by them to defendant, allegations of complaint and court's findings that plaintiffs conveyed property to defendant on such promise and demanded reconveyance thereof by him and that he refused to reconvey supported court's finding and judgment that defendant held property in voluntary constructive trust or positive voluntary trust resting in parol.

2. Trusts 🔑96

Violation of parol promise to reconvey to promisees realty conveyed by them to promisor constitutes fraud on which voluntary constructive trust or positive voluntary trust resting in parol arises.

3. Trusts 🔑110

In parents' action against their son for specific performance of his oral promise to reconvey to plaintiffs realty conveyed by them to defendant, evidence supported trial court's findings of such promise and existence of confidential relationship between parties, so as to warrant finding and judgment that defendant held property in trust for plaintiffs.

4. Appeal and error 🔑1071(6)

The trial court's failure to find expressly existence of confidential relationship, established by evidence, between parties to parents' suit for specific performance of their son's oral promise to reconvey to plaintiffs realty conveyed by them to son, did not necessitate reversal of judgment that son held property in trust for plaintiffs, in absence of evidence supporting contrary finding.

5. Limitation of actions 🔑103(2)
Trusts 🔑138

Where son first informed his parents that he did not intend to reconvey realty to them about six months before commencement of their action to enforce his oral promise to reconvey, neither claim of title to realty by adverse possession, nor bar of statute of limitations, was open to son, as parents were entitled to rely on promise, and statute did not begin to run, until son's repudiation of promise.

6. Appeal and error 🔑173(2)

In parents' action to enforce their son's oral promise to reconvey to plaintiffs realty conveyed by them to son on such promise, defense, not pleaded nor shown by record to have been suggested in trial court, that plaintiffs came into court with unclean hands because they conveyed property in order to enable son to represent himself as owner thereof in affidavits guaranteeing that plaintiffs would not become public charges if admitted to United States as immigrants, was not available to son on his appeal from judgment that property was held in trust by him for plaintiffs.

7. Equity ⟹65(3)

A suitor's misconduct must be so intimately connected, to injury of another, with matter for which suitor seeks equitable relief, as to render it inequitable to accord him such relief, in order to prevent him from obtaining it.

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Frank J. Baumgarten, San Francisco, Alexander Riaboff, San Francisco, attorneys for plaintiffs and respondents.

Phil F. Garvey, San Francisco, Julia M. Easley, San Francisco, attorneys for defendant and appellant.

DOOLING, Justice.

This litigation is between parents as plaintiffs and their son as defendant. In 1939 the son, hereafter called Peter, was residing and domiciled in the United States of America and his parents, hereafter called Michael and Maria, were in this country temporarily, their place of domicile then being Harbin, China. While in this country in 1939 Michael and Maria acquired by deed the title to real property in San Francisco improved with an apartment house. They in turn deeded the property to Peter in the same year and returned to Harbin. Maria reentered the United States as an immigrant in 1941 and Michael returned as an immigrant in 1946. Upon Michael's return he demanded of Peter that Peter reconvey the apartment house property to Michael and Maria and upon Peter's refusal the parents commenced this action.

[1, 2] The complaint alleged and the court found that plaintiffs conveyed the property to defendant upon his oral promise to reconvey it to plaintiffs, their demand upon him to reconvey and his refusal. The facts so pleaded and found support the finding and judgment that the property is held in trust for Michael and Maria by Peter, the trust being of that character sometimes described as a voluntary constructive trust or a positive voluntary trust resting in parol. O'Brien v. O'Brien, 50 Cal.App.2d 658, 660, 123 P.2d 877. "It is the violation of the parol promise which constitutes the fraud upon which the trust arises." Cooney v. Glynn, 157 Cal. 583, 587, 108 P. 506, 508.

[3, 4] Although appellants argues to the contrary the evidence supports the finding of an oral promise to reconvey. Michael testified: "My son * * * said that he will keep my property until I come back * * *" and further that he refused a request of Peter to convey the property to him as a gift.

The confidential relationship between the parties, Cooney v. Glynn, supra; Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31, was established by the whole tenor of the parents' testimony and Michael at one point explained the reason for the conveyance to Peter by testifying: "* * * since I loved my son very much and I considered him as the closest person to me, I thought that I will have no difficulties of getting my property back * * *." Appellant cites certain cases to the effect that the status of parent and child is not per se a confidential one, but the confidential relationship as a fact was established in this case. See the discussion in Steinberger v. Steinberger, supra, 60 Cal.App.2d 116, at page 122, 140 P.2d 31. The failure of the court to expressly find the existence of a confidential relationship does not necessitate a reversal since a reading of the entire record satisfies us that the evidence would not support a finding to the contrary. Swallers v. Swallers, 89 Cal.App.2d 458, 461, 201 P.2d 23.

[5] Neither a claim of title by adverse possession nor the bar of the statute of limitations is open to appellant. Until the repudiation of the oral promise to reconvey the grantors are entitled to rely on the

promise and the statute only commences to run upon the repudiation of the oral agreement. O'Brien v. O'Brien, supra, 50 Cal. App.2d 658, 660, 123 P.2d 877; Airola v. Gorham, 56 Cal.App.2d 42, 54, 133 P.2d 78; Steinberger v. Steinberger, supra, 60 Cal. App.2d 116, 124, 140 P.2d 31.

The testimony of Maria was that she requested her son to reconvey the property to her in 1943 and 1944 on several occasions and in 1944 "my son answered that because I have no experience he rather thinks that we should wait until the father returned to the United States." She also testified that at no time did Peter ever state to her that he was the owner of the property. Michael testified that shortly after his return to this country in July 1946 he asked Peter for a conveyance and Peter refused. The evidence supports the finding that Peter for the first time in July, 1946 informed his parents that he did not intend to reconvey. The action was commenced in January, 1947.

[6] Appellant attempts to raise on appeal the defense of unclean hands. This defense was not pleaded nor, so far as the record discloses, suggested in any manner in the trial court. The claim is based on the testimony of Michael that he conveyed the property so that Peter could represent himself to be its owner in an affidavit or affidavits guaranteeing that Michael and Maria would not become public charges if admitted to the United States as immigrants; and that such affidavits were in fact made and used in procuring the entry visas of Michael and Maria. The record further shows the statement of counsel for respondents that his investigation had satisfied him that every immigrant must present the affidavit of some resident of this country guaranteeing the immigrant's support if admitted. No act of Congress is pointed to requiring such an affidavit and we are left to assume that the requirement is one made by departmental rule or regulation. The form of the assumed regulation was not established, nor was it shown whether it was required that the affiant be a property owner. If the point had been urged in the trial court counsel for respondents could have established these facts and might have shown that the representation as to ownership of the property was not necessary or material.

It was said in Watson v. Poore, 18 Cal. 2d 302, 311–312, 115 P.2d 478, 483:

> "Appellants did not plead the defense of unclean hands and the trial court made no finding thereon * * *.
>
> "* * * However, when we consider that the trial court had no opportunity in the instant case to pass on that defense as it was not pleaded or called to its attention, we must conclude that it is not now available to appellants."

We are mindful of the cases that hold that in a clear case for the application of the clean hands doctrine the court may deny relief sua sponte. This is not such a case. The government is not actually injured since the ownership of the property by the immigrants is more likely to prevent them from becoming public charges than its ownership by the son, and we cannot know that if the beneficial interest of respondents in the property had been disclosed they might not as readily have been admitted to the country. If the issue had been made additional evidence to clear up these matters might have been produced.

[7] The language of the court in Bradley Co. v. Bradley, 165 Cal. 237, 242, 131 P. 750, 752, which also dealt with an affidavit falsely asserting full title in a trustee, seems apposite:

> "But, whatever judgment may be placed upon Richard Bradley's conduct in the forum of good morals, it was not a fraud of which law or equity takes cognizance. It was not designed to injure anybody. In fact, it injured nobody, least of all respondent, who seems to see in it rather an opportunity to make use of it to her advantage. It is not every wrongful act nor even every fraud which prevents a suitor in equity from obtaining relief. His misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief, as to make it inequitable to accord him such relief."

Judgment affirmed.

GOODELL, Acting P. J., concurs.

94 Cal.App.2d 762

BOYER v. WOODALL.

Civ. 16902.

District Court of Appeal, Second District,
Division 1, California.

Nov. 23, 1949.

Rehearing Denied Dec. 13, 1949.

Action in ejectment by Charles A. Bank, for whom Olorenza A. Boyer was substituted, against Sarah F. Woodall to recover possession of realty for default in payments under contract to purchase.

The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment in favor of defendant, and orders denying plaintiff's motions for judgment and for a new trial and plaintiff appealed.

The District Court of Appeal, Doran, J., held that the evidence sustained findings and conclusion of trial court and that court did not exceed its jurisdiction in decreeing in accordance with contract that upon payment of determined amount and execution of deed of trust plaintiff should convey the realty to defendant. The Court affirmed the judgment and the order denying plaintiff's motion for judgment and dismissed the appeal from order denying a new trial.

1. Appeal and error 🔑1010(1)

A judgment supported by substantial evidence will not be reversed on ground that under the view of evidence taken by appellant, trial court should have rendered judgment against respondent.

2. Attorney and client 🔑143

Evidence sustained finding that agreement by purchaser to pay vendor, who, though an attorney, had acted in propria persona as owner of three-tenths interest in realty and trustee of the remainder, an attorney fee of $250 in addition to further sum of $1,000 for reinstatement of purchaser's rights under contract to purchase realty was without consideration and void.

3. Vendor and purchaser 🔑299(3)

Evidence sustained finding that purchaser was not delinquent in payments under contract to purchase realty but had paid all sums due and trial court properly concluded that vendor was not entitled to judgment for possession.

4. Vendor and purchaser 🔑299(4)

In ejectment action by vendor, trial court, having found that purchaser was not delinquent in payments under contract to purchase realty, did not exceed its jurisdiction in decreeing in accordance with contract that upon payment by purchaser of determined amount and execution of deed of trust to secure payment of balance of purchase price, vendor should convey the realty to purchaser free and clear of other incumbrances.

5. Equity 🔑38

Equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy, not only to avoid a multiplicity of suits, but also to make the court's decree safe to obey.

Jones & Hoyt, and George A. Elstein, Los Angeles, for appellant.

Harold L. Green, Los Angeles, for respondent.

DORAN, Justice.

The complaint herein is for ejectment to recover possession of certain real estate located in the City of Los Angeles, and alleges that the respondent had defaulted in the making of payments required under an agreement to purchase the real estate dated August 30, 1945, for which reason respondent's rights as purchaser had terminated. Respondent's answer sets up a previous contract dated May 10, 1944, amended about April 9, 1945, and alleges that the contract of August 30, 1945 was without consideration, and that respondent was in possession under the previous contract as amended. The answer prays that the court adjudicate respondent's rights, determine the amount due and permit respondent a reasonable time to make the defaulted payments.

The facts, as found by the trial court and supported by the record, may be summarized as follows. Charles A. Bank, an attorney at law and the original plaintiff, owed a three-tenths interest in the property, holding the remainder as trustee for other persons. After defaults by respondent in respect to payments called for in the original purchase contract of May 10, 1944, an action to recover possession was commenced by Attorney Bank, in propria persona, followed by a reinstatement agreement and amended contract dated April 9, 1945.

This amended contract was in turn followed by an ejectment action by Bank, in propria persona. While the latter action was pending respondent called at Bank's office and was advised by the attorney-plaintiff, as testified to by respondent, "that I was all washed up, I had forfeited all my right and title, there was nothing left but to go out. * * * Finally, when he saw how badly I felt, he said he would accept the money under one consideration, if I would pay the contract up to date, in full, and give him the privilege of making a new contract, adding a thousand dollars to the contract, paying him $250 for a title fee, and monthly payments". The attorney prepared such a contract which described the $250 as for attorney fees, mailed it to respondent who signed the same and returned it in person to Attorney Bank. Respondent was not then represented by an attorney. Bank thereafter filed the present action in ejectment, based upon respondent's alleged default in performance of the last contract.

The trial court found, among other things, that the provision in the final contract of August 30, 1945 by which respondent promised to pay Charles A. Bank the sum of $250.00 as attorney fees "was and is null and void and entirely lacking in consideration, but that said agreement to pay attorney fees was severable from the remainder of said contract and does not vitiate the same"; that otherwise said contract was in full force and effect at the time of filing the present action, and was supported by sufficient consideration. The court further determined that "at the date of filing of the Complaint herein, defendant Sarah F. Woodall, as buyer, had paid * * * all sums due and owing", and "That plaintiff is not entitled to judgment for possession of said real estate" except as later specified in the conclusions of law.

In addition to the above, the trial court concluded that the respondent was entitled to an interlocutory judgment adjudging that if respondent within thirty days paid or tendered to appellant the sum of $3,660.62, with interest, and a further sum of $432.00 for taxes and should deliver a promissory note for $7,500.00, the balance due on the purchase price, respondent "shall be entitled to a deed granting and conveying said real estate * * * to her, free and clear of incumbrances" with the exception of deed of trust; that should respondent fail to make such payment or tender within thirty days, then appellant was entitled to the possession of said real estate. Judgment was entered accordingly; respondent thereafter made the required tender which was refused by the appellant. Appellant's motion for a new trial was denied; there was likewise a denial of a motion to set aside the interlocutory judgment and to enter judgment for appellant on the ground that at the time of the tender appellant did not know the legal status of the property or of the existence of certain alleged liens or judgments against the respondent.

Appellant's brief presents the following points: (I) "The court erred in holding that the provisions * * * for the payment of $250.00 (for attorney fees) was lacking in consideration and null and void"; (II) the court erred in finding that the respondent was not delinquent in her payments; (III) the court erred in its conclusions of law that appellant was not entitled to judgment for possession, and that respondent had paid all sums due; (IV) the court erred in decreeing that upon payment or tender being made of the amount found due, the plaintiff should convey the property to respondent free and clear except as to the deed of trust hereinbefore mentioned.

[1] The specifications of error urged by the appellant are without merit. The general purport of the contentions is that, under the view of the evidence taken by appellant, the trial court should have rendered judgment against the respondent. It is well understood, however, that an appellate court will not reverse a judgment

on this ground where the record discloses substantial evidence in support of the judgment rendered. This is the situation presented by the record in the instant appeal.

[2] In reference to the finding that the agreement to pay original plaintiff, Charles A. Bank, an attorney at law but acting in propria persona, an attorney fee of $250.00 in addition to a further sum of $1,000.00, for reinstatement of respondent's rights as purchaser, the record reveals that Attorney Bank, when interrogated by the trial judge, stated. "I don't think I can state I rendered any services directly for Mrs. Woodall (the respondent)." Bank further testified, as noted in respondent's brief, "that he was not out of pocket any money for attorney fees; that he did not engage any outside counsel and that there was but one account existing between respondent and him, namely, the account for the purchase of the property in question". The only testimony received at the trial was that of Charles A. Bank and of the respondent, Mrs. Woodall. In view of this and other evidence, it cannot be said that the finding was without evidentiary support.

[3] What has been said in reference to appellant's first point is likewise applicable to the contention in Point II that the trial court erred in finding that respondent was not delinquent, and to the appellant's other contentions that the judgment was unjustified and that appellant should have been adjudged possession of the property involved herein.

[4] Appellant's final contention that the trial court exceeded its jurisdiction in decreeing that upon payment of a determined amount and the execution of a deed of trust, appellant should convey the property to respondent free and clear of other encumbrances, is without merit. As respondent's brief points out, "the trial court was merely enforcing the terms of the contract", which provided that if the "Buyer shall reduce the unpaid principal balance of the purchase price to the sum of at least Seven Thousand Five Hundred Dollars ($7,500.-00) Buyer shall be entitled to receive deed * * * subject to execution of * * * deed of trust", etc.

[5] Respondent's brief further comments on the fact that several law suits had already been pending in reference to the transaction, and that "Equity having once obtained jurisdiction of a cause will dispose of the entire controversy, not only to avoid a multiplicity of suits but also to make the Court's decree safe to obey", a principle particularly applicable to the present controversy.

The judgment is affirmed; the order denying plaintiff's motion for judgment is affirmed; appeal from order denying a new trial is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

94 Cal.App.2d 785

MILLER v. MILLER et al.

Civ. 3877.

District Court of Appeal, Fourth District, California.

Nov. 23, 1949.

Frances M. Miller sued John W. Miller and others and Thomas G. Miller, as administrator of the estate of Benjamin L. Miller, deceased, for a declaratory relief to determine her rights to the proceeds of certain life policies, and defendants filed cross-complaints.

The Superior Court of Orange County, Robert Gardner, J., rendered judgment for the plaintiff, and defendants appealed.

The District Court of Appeal, Barnard, P. J., affirmed the judgment, and held that a property settlement agreement between the plaintiff and her former husband did not bar her right to receive, as beneficiary, the proceeds of life policies on the life of her former husband.

1. Husband and wife 🔑279(1)

Where a property settlement agreement covers all property of parties, and the wife, in accepting certain provisions for her benefit, fully releases husband with respect to all other property, such a release would ordinarily cover and include her interest as named beneficiary under an insurance policy, but where language used in agreement is not broad enough to include such an interest, or where an intent appears to exclude such rights as a present part of the settlement, wife will still take as a beneficiary if policy so provides.

2. Assignments ⚷31

A contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides.

3. Husband and wife ⚷279(1)

In interpreting property settlement agreements, courts weigh carefully the language of the agreement before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements.

4. Husband and wife ⚷279(1)

General expressions or clauses in property settlement agreements between husband and wife are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under policy or under a will if it does not clearly appear from agreement that in addition to segregation of property of spouses it was intended to deprive either spouse of right to take property under a will or policy.

5. Husband and wife ⚷279(1)

Property settlement agreement between husband and wife wherein parties agreed that each conveyed and released to the other specified items of property and each agreed not to claim from other specifically named rights did not bar right of beneficiary of life policy to receive proceeds of policies on life of former husband.

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Wm. P. Webb, Anaheim, for appellants.

Launer, Chaffee & Launer, Fullerton, for respondent.

BARNARD, Presiding Justice.

The question presented on this appeal is whether a property settlement agreement must be held to have barred the right of the plaintiff to receive, as beneficiary, the proceeds of four insurance contracts on the life of her former husband.

The plaintiff and Benjamin L. Miller were married on September 21, 1935. At that time he was the holder of four life insurance contracts. Three of these were in the form of certificates issued to him as an employee of the Union Oil Company, under the provisions of a Group Life Insurance Policy, by the Equitable Life Assurance Society. The other was a policy issued by the Great Northern Life Insurance Company. From 1935 until August, 1946, the premiums on these contracts were paid from the community funds of the plaintiff and her husband. In July, 1936, the plaintiff was designated as beneficiary in the Great Northern policy and, at some undisclosed date, she was named as beneficiary in one of the certificates issued by the Equitable. The other two Equitable certificates named Mr. Miller's mother as beneficiary. She had died in 1933, and no change in beneficiary was ever made. These certificates provided, so far as material here, that in such an event the proceeds would be paid to the widow or, if there was no widow, to the surviving brothers and sisters of the insured.

On August 20, 1946, the plaintiff and her husband entered into a written agreement. The preamble recites that the parties are husband and wife and have no children, that differences have arisen between them, and that "it is the mutual desire of said parties that their property rights, interests and claims against each other be settled and adjusted by and between themselves." It is then provided that the husband thereby conveys and relinquishes to the wife all his right, title and interest in and to certain specific items of personal property; that the wife conveys and relinquishes to the husband a described parcel of real property and certain specified articles of personal property; that the husband agrees to pay the wife $720 at the rate of $60 per month; and that any property thereafter acquired by either shall be the separate property of the party acquiring it. This is followed by a final provision which reads as follows: Each of the parties do hereby agree that, except as herein provided, neither will claim from the other hereafter and does hereby waive as though the marital relationship had never existed, any right against the other for support, alimony, court costs or attorney's fees in any action affecting the marital duties or relationship and any right to inherit from, to claim a probate homestead upon or to administer the estate of the other, it being the purpose of this agreement to determine the rights of the parties hereto for all times as though the marital relationship had never existed between the said parties." This agreement made no mention of community property, of these insurance policies, or of any property which might be owned by the parties other than the specific items which were thus allotted to the husband and to the wife, respectively.

A divorce action followed in which no mention was made of these insurance policies. On October 14, 1946, an interlocutory decree in favor of this plaintiff was entered. In November, 1946, the husband suffered a heart attack and thereafter was confined to the hospital or to his home. He died on March 18, 1947, leaving neither children nor parents. During this illness the plaintiff and her husband remained on friendly terms, and she visited him frequently. On one of these visits he handed her an envelope containing these insurance contracts saying: "Here is some papers that belong to you." After Mr. Miller's death the proceeds of the two policies in which this plaintiff was named as beneficiary were paid to her. Conflicting claims having been filed with respect to the other two contracts, which still named Mr. Miller's mother as beneficiary, the Equitable company refused payment thereon.

The plaintiff then brought this action for declaratory relief with respect to the two insurance contracts which remained unpaid. By agreement, the insurance company deposited the amounts in court, and was relieved from further liability. The defendants, who are the brothers and sisters of Mr. Miller, answered. As a special defense it was alleged that the property rights of the parties, including community property, were forever settled by the agreement of August 20, 1946; that the plaintiff accepted the provisions therein made for her benefit in full satisfaction of any interest she might have had in these insurance policies; and that the parties intended by said agreement that the plaintiff would, and she did, thereby waive any interest which she might have had in these policies. The defendants, joined by the administrator of Mr. Miller's estate, also filed a cross-complaint seeking to recover the sum of $2435.68 which had already been paid to the plaintiff under two of the contracts. After a trial the court found in favor of the plaintiff finding, among other things, that it is not true that the parties intended, by the execution of this agreement or otherwise, that the plaintiff should accept theprovisions made for her benefit in satisfaction of her interest in these four policies, and that it is not true that she had waived any part of her interest in said policies. As conclusions of law, it was found that the plaintiff is the owner and is entitled to the proceeds of these four insurance policies, as the designated beneficiary under the terms of each; that she is entitled to judgment against the defendants in accordance with her complaint; and that she is entitled to judgment as against all cross-complainants on their cross-complaint. Judgment was entered accordingly, and the defendants and cross-complainants have appealed.

The appellants contend that while the settlement agreement does not, in specific terms, relinquish the wife's interest as beneficiary under these policies it does waive all rights of the parties arising from the marital relationship, and that it thus conclusively appears that it was thereby intended that the wife should release her interest as beneficiary under each of these policies. The appellants rely on Sullivan v. Union Oil Co. of California, 16 Cal.2d 229, 105 P.2d 922, while the respondent relies on Grimm v. Grimm, 26 Cal.2d 173, 157 P.2d 841, 843.

In the Sullivan case, in reversing a judgment entered after a demurrer was sustained without leave to amend, it was pointed out that in the agreement there in question the parties had agreed to completely settle and divide all their properties, including that of the community, and the wife had agreed to waive any right of succession or inheritance with respect to the husband's remaining property and to release him from any and all obligations to her arising from any reason whatsoever. It was held that a certain "Provident Fund", accumulated through the employment of the husband, was a part of the community property so divided and that the wife had thus expressly released to her husband any rights which she may have had as a named beneficiary in connection with this fund.

[1] In the Grimm case the agreement stated that it was intended as a complete property settlement, and as settling and discharging all claims which arose or which might arise by reason of the marriage of the parties. An insurance policy, in which the wife was named beneficiary, was given to the husband with the right to change the beneficiary. He died without having made such a change. It was held that there was no immediate release of the wife's interest as such beneficiary, that the contract left it to him to decide in the future whether or not he desired to change the beneficiary, and that not having done so the wife was entitled to receive his bounty to that extent. It would seem, from these cases, that where such a settlement agreement covers all of the property of the parties and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such a release would ordinarily cover and include her interest as named beneficiary under an insurance policy; and that where the language used is not broad enough to include such an interest, or where an intent appears to exclude such rights as a present part of the settlement, the wife will still take as beneficiary if the policy so provides.

[2-4] Aside from any community interest in an insurance policy, it is pointed out in the Grimm case that the interest of a beneficiary, where the right of change exists, is a mere expectancy. After referring to the fact that there may be an equitable assignment or release of such an expectancy, it is said: "It is settled, however, that a contract constitutes an equitable assignment or renunciation of an expectancy *only if it expressly or by necessary implication so provides.* (Citations.) In interpreting property settlement agreements courts weigh carefully the language of the agreements before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements. (Citations.) This court and other courts have therefore applied to property settlement agreements the rule that *general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies* and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other." (Emphasis added.) It was further pointed out in that case that such an expectancy under an insurance policy is to be regarded as waived only when the intention of the parties to disclaim such future rights "was made clear in the contract"; that the failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he did not wish to effect such a change; that both the contract and the policy are to be read as expressing the decedent's intentions; and that while a property settlement agreement provides for what the husband is conceding to his wife as a matter of right, he is frequently willing to grant her more as a matter of bounty.

[5] With these general rules in mind, each case must be decided upon its own facts. The agreement here in question is somewhat unusual. The preamble states that the parties desire to settle and adjust their property rights, interests and claims against each other. Thereafter, it is agreed that each conveys and releases to the other all his right and interest in and to certain specified items of property. It is not stated that this is all of their property, no mention is made of these insurance pol-

icies or of any community property, it is not provided that the wife takes the property assigned to her in full satisfaction of all her rights and there is no provision that the property not mentioned shall belong to the husband. It is not specifically stated that these policies, in which each had a community interest, should become the separate property of the husband, and there is no provision that no rights should accrue to the wife even though she remained the beneficiary at the time of the husband's death. The final paragraph consists of but one sentence, and provides that each party agrees that he will not claim from the other and that he thereby waives "as though the marital relationship had never existed" certain rights against the other. These rights are specifically named and they are the right "for support, alimony, court costs or attorney's fees in any action affecting the marital duties or relationship and any right to inherit from, to claim a probate homestead upon or to administer the estate of the other." This language was not only general, but was used in the same sentence, and as a part of, this definite provision respecting these specified marital duties and rights only. Not only is that the only waiver but it is equally made by each of the parties. There is no waiver of any interest in any property which was not mentioned, each waives the same things, and the wife waives no more than does the husband. There is nothing to indicate that the rights of the parties in these insurance policies were not to remain just as they were, the husband having the right to certain benefits if he reached a certain age and the wife, as beneficiary, having the right to any proceeds upon his death. In our opinion, it does not clearly appear from the language of this agreement that the parties intended it as covering and disposing of their respective interests in these policies, or that it was intended to deprive the wife of the right to take as a beneficiary thereunder.

There was some evidence relating to the intention of the parties. There was evidence that the deceased was told to bring these policies to the lawyer's office at the time this agreement was signed. He did not do so, and the record indicates that nothing was said about them at the time. The respondent testified that when the agreement was signed she knew of the existence of these policies but that "I did not think anything about those, no." Under the terms of the policy the deceased had the right to change the beneficiary, but he did not do so. In November, 1946, in the presence of two other witnesses, the husband handed the policies to the respondent saying, "Here is some papers that belong to you." Two days later, in the presence of two other witnesses, she offered to return the policies to him and he refused to take them, saying that they belonged to her.

The interpretation placed upon this contract by the trial court is a reasonable one under the circumstances which here appear, and it is supported by such evidence as there was relating to the intention of the parties. Under the established rules we are unable to hold, as a matter of law, that it was the intention of the parties to provide by this agreement that the respondent should release or waive her interest, as beneficiary under, these policies.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

MONARCO v. LO GRECO et al. (two cases).

Civ. 17106, 17107.

District Court of Appeal, Second District,
Division 1, California.

Nov. 23, 1949.

Rehearing Denied Dec. 9, 1949.

Hearing Granted Jan. 19, 1950. *

Action by Carmen Monarco against Christie LoGreco and another, as executors of the will of Carmela Castiglia, deceased, and others and against Christie LoGreco and Nick Norcia as executors of the last will of Carmela Castiglia, deceased.

The Superior Court of Los Angeles County, Albert F. Ross, J., found that there was a binding agreement between Natale and Carmela not to terminate a joint estate, and declared Carmela to be owner of joint tenancy property distributed to Carmen in the probate proceedings, and from the judgments plaintiff appeals.

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* Subsequent opinion 220 P.2d 737.

The District Court of Appeal, Drapeau, J., affirmed the judgments holding that Carmen was estopped to set up the statute of frauds against the agreement.

1. Frauds, statute of ⚷144

Courts of equity may hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, and estoppel in such circumstances, is not limited to any particular class of contracts included in the statute provided its essential elements are present. Civ. Code, § 1624, subd. 6, Code Civ.Proc. § 1973, subd. 6.

2. Frauds, statute of ⚷144

Where property was held by husband and wife as joint tenants, and evidence established an oral agreement between the spouses that their property was to be held irrevocably in joint tenancy and that for his services a stepson was to get the spouses' property when they died, and such agreement was implemented by vesting title in the spouses in joint tenancy and by wills naming the stepson as principal beneficiary and shortly prior to his death the husband terminated the joint tenancies and left his half of the property to a grandson, the grandson as against the stepson was estopped to assert the statute of frauds. Civ.Code, § 1624, subd. 6, Code Civ.Proc. § 1973, subd. 6.

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Allen M. Williams, Montrose, for appellant.

Oliver O. Clark, Los Angeles, for respondents.

DRAPEAU, Justice.

Some thirty years ago Natale Castiglia was married in Colorado. Natale had been married before. His first wife died. One daughter was born of that marriage. The daughter also married and had one son. This boy, the only grandson of Natale, was named Carmen Monarco. Carmen's mother passed away in 1918 while he was very young, and the boy was raised in Colorado. The evidence shows that Natale paid very little attention to Carmen until the last year of Natale's life.

Natale's second wife was Carmela. Carmela too had been married before, and she also had lost her first spouse by death. By her first marriage Carmela had three children: Rosie, John, and Christie. No children were born of the marriage between Natale and Carmela. Rosie, Carmela's daughter, subsequently married Nick Norcia.

Natale and Carmela were in their fifties when they were married. Shortly thereafter they disposed of their possessions in Colorado, and came to California. Natale had about $3,000 and Carmela about $1,000. Carmela's children were brought along, but John was never an active member of the family.

For working purposes, the family consisted of Natale, Carmela, Nick Norcia, the son-in-law, his wife, Rosie, and Christie, stepson of Natale and son of Carmela. Until Natale's death these people comprised a compact little unit, fronting a rough world. They worked together; at times they all lived together; and they prospered together.

As property was acquired, it was held in common tenancy among Nick and his wife, Rosie, as to an undivided one half, and Natale and Carmela as to the other half. Then Natale and Carmela held their half as joint tenants, so that upon the death of either the other would get all of the holdings of that branch of the family.

Christie's relationship to Natale and Carmela was more than a son. He was the working son; the one who kept the family together as the parents grew older. The family were good vineyardists. They all worked "like horses." Property near Cucamonga was purchased, and sold at a profit. Vineyards were leased and operated successfully. A twenty-acre vineyard near La Canada was acquired and has since been kept. From work, and frugality, and savings, other properties were purchased, until, when Natale died, the family was wealthy, Natale's and Carmela's share being worth nearly $100,000.

For thirty years Christie participated in all these endeavors, without compensation. All he got was his board and room and spending money. He didn't go very far in grammar school; work kept him away from his classes; but Natale told him that that would be all right because when the old folks were through with it he would get all of their property. Sometimes when Christie worked for others for wages his earnings went into the family treasury. His stepfather's promise must have been often in his mind as he went from one row to another long row of grapes, cultivating and pruning the vines, and picking the crops.

An abundance of uncontradicted, clear and convincing testimony supports the proposition that it was orally agreed between Natale and Carmela that their property was to be held irrevocably in joint tenancy, and that, for his services, Christie was to get the old folks' property when they died. This agreement was implemented by vesting title in them in joint tenancy, and by wills made by each of them naming Christie as principal beneficiary, with remembrances for Rosie and John.

Then Natale died. The day after the funeral a bombshell was exploded in the family, for Carmen, the grandson, appeared and informed them that the old gentleman shortly before he died had terminated the joint tenancies, and by his last will had left to him, Carmen, his one half of all of the property theretofore in joint tenancy.

It is idle to speculate as to the motives which may have impelled Natale to do this. Perhaps it was some memory of his long-dead first wife and daughter. Perhaps he thought that after all he should leave something to his grandson, his only descendant of flesh and blood. Or, perhaps it was because of some squabble with Christie and Christie's mother. The testimony indicates that this may have occurred.

In any event, Natale had the legal right to terminate the joint tenancies and to make a new will, unless bound by agreement with Carmela not to do so. No question is raised as to his mental capacity.

After probate proceedings and decree of distribution, issues as to the agreement and its effect were framed, and tried. The court found that there was a binding agreement between Natale and Carmela not to terminate the joint estate, and enforced its finding by judgments declaring Carmela to be the owner of the joint tenancy property distributed to Carmen in the probate proceedings. From these judgments appeals were perfected.

Two actions were consolidated and tried together. As identical questions are involved and the evidence is the same in each case, they will be considered and disposed of together. After the cases came to this court Carmela died; but for purposes of this opinion she will be referred to as "Carmela," and reference will not be made to her personal representatives substituted in her place.

For a long time in California equity enforced specific performance of contracts to will property to persons rendering services to decedents. It was said that when services of extraordinary and exceptional character continued over a long period of years and could not be compensated for with money, equity, to promote justice, would grant relief, even to the extent of following property disposed of by will contrary to the asserted agreement. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728. In 1905 subdivision 6 of section 1624 of the Civil Code and in 1907 subdivision 6 of section 1973 of the Code of Civil Procedure were amended, so that our Statutes of Frauds now declares such agreements to be invalid unless evidenced by a memorandum in writing subscribed by the party to be charged.

With certain exceptions, our courts have enforced these amendments to these code sections since their enactment. O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861.

Among these exceptions are cases in which courts of equity have held persons estopped to assert the bar of the Statute of Frauds. In Seymour v. Oelrichs, 156 Cal. 782, 794, 795, 106 P. 88, 94, 134 Am.St.Rep. 154, it is said:

[1] "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pomeroy's Equity Jurisprudence, § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 35, 3 Am.Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.'"

Estoppel in these circumstances is not limited to any particular class of contracts included within the Statute of Frauds, providing always its essential elements are present. Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198.

[2] In the instant case the trial court found all of the facts to estop Carmen Monarco as the sole beneficiary under the will of Natale Castiglia from taking the property devised and bequeathed to him by Natale. The evidence is clear and convincing and substantially supports the finding.

The judgments are affirmed.

WHITE, P. J., and DORAN, J., concur.

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94 Cal.App.2d 694

BRODERICK v. SUTHERLAND et al.

Civ. 17034.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1949.

Marlene Broderick, a minor, by her guardian ad litem, W. R. Turner, sued Doyle L. Sutherland and another for personal injuries sustained when struck by an automobile driven by named defendant.

From an order of the Superior Court of Los Angeles County, Stanley Mosk, J., granting defendants' motion for a new trial after a jury's verdict for plaintiff, plaintiff appealed.

The District Court of Appeal, McComb, J., affirmed the order, holding that the Superior Court clerk's minute order granting a new trial for insufficiency of the evidence to sustain the verdict was not ineffectual because the court did not, by written order, direct the clerk to enter such minute order, and that the trial judge did not abuse his discretion in granting the motion.

1. New trial ⚷163(1)

A superior court clerk's minute order, granting defendants' motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for plaintiff, was not ineffectual because court did not, by written order, direct clerk to enter such minute order. Code Civ.Proc. § 657.

2. Appeal and error ⚷979(2)

An order granting new trial for insufficiency of evidence to sustain jury's verdict will not be disturbed on appeal, in absence of showing of abuse of trial court's discretion.

3. New trial ⚷71

The trial judge, in considering sufficiency of evidence to sustain jury's verdict, on motion for new trial, may draw inferences contrary to those of jury from evidence, though uncontradicted, and must resolve conflicts in evidence in determining whether issue should be retried.

4. New trial ⚷71

In personal injury suit, physician's testimony for defendants that his examination of plaintiff disclosed no complaints referable to injury and that there was no reason why she should have stayed in bed or remained away from school longer than a week or two raised conflict with plaintiff's contrary evidence, so as to require trial judge, on defendants' motion for new trial, to determine, in his sound discretion, whether evidence sustained jury's verdict for plaintiff as to amount of damages awarded.

5. New trial ⟹76(4)

In personal injury suit, physician's testimony for defendants that his examination of plaintiff disclosed no complaints referable to injury and that there was no reason why plaintiff should have stayed in bed or remained away from school longer than a week or two justified trial judge's order granting defendants' motion for new trial on ground that jury's verdict awarding plaintiff $3,500 damages was excessive and not sustained by evidence.

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Daniel Schnabel and Royal M. Galvin, Beverly Hills, for appellant.

Parker, Stanbury & Reese, Los Angeles, White McGee, Jr., Los Angeles, for respondents.

McCOMB, Justice.

From an order granting defendants' motion for a new trial after a jury had returned a verdict in favor of plaintiff for the sum of $3,500.00 in an action to recover damages for personal injuries, plaintiff appeals.

Facts: On November 16, 1948, the clerk in the trial court entered the following minute order:

"Come now the parties by their respective counsel, Royal M. Galvin for the plaintiff, and Parker, Stanbury & Reese by White McGee, Jr., for the defendants, and the defendants move the court for a new trial herein, upon the grounds stated in the notice of intention to move for a new trial, filed herein. After argument by Counsel, the Court rules as follows: If consent for reduction of judgment to $2,000.00 is not filed within ten days, motion for a new trial is granted on the ground of the insufficiency of the evidence to sustain the verdict; otherwise the motion will be denied."

On December 15, 1948, another minute order was entered, reading as follows:

"It is ordered that the minute order of November 10, 1948 be corrected nunc pro tunc as of November 10, 1948 by changing the words 'Will Be' to 'Is', so the minute order will read as follows: If consent for reduction of judgment to $2,000.00 is not filed within ten days, motion for a new trial is granted on the ground of the insufficiency of the evidence to sustain the verdict; otherwise the motion is denied."

[1] *Questions*: First: *Since the trial court, in granting the motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict, did not so specify by giving the clerk a written order, was the minute order of November 16, 1948, ineffectual as contrary to the provisions of section 657 of the Code of Civil Procedure?*

This question must be answered in the negative. Plaintiff in contending that the minute order was ineffectual because the trial court did not, by a written order, direct the clerk to enter a minute order granting a new trial on the insufficiency of the evidence, relies on Thomas v. Driscoll, (1940) 42 Cal.App.2d 23, 26 et seq., 108 P.2d 43, and Whitley v. Superior Court, (1941) 18 Cal.2d 75, 82, 113 P.2d 449, which cases sustain plaintiff's contention. However these cases, so far as this point is concerned, were overruled by the Supreme Court in the case of Dempsey v. Market Street R. Co., (1943) 23 Cal.2d 110, 115 et seq., 142 P.2d 929 (See also Cox v. Tyrone Power Enterprises, Inc. (1942) 49 Cal.App.2d 383, 391, 121 P.2d 829; Gossman v. Gossman (1942) 52 Cal.App.2d 184, 188, 126 P.2d 178.) It is now the law that under section 657, Code of Civil Procedure, it is immaterial whether a trial court, granting a new trial for insufficiency of the evidence, employs a minute order or a separate formal order so long as the written record is made within the time limited by the code section.

[2–5] Second: *Did the trial court abuse its discretion in granting the motion for a* *new trial on the ground of the insufficiency of the evidence?*

This question must also be answered in the negative, and is governed by these rules:

(1) An order granting a new trial on the ground of insufficiency of the evidence to sustain the judgment will not be disturbed on appeal unless there is a showing of abuse of the trial court's discretion. (Williams v. Field Transportation Co., 28 Cal. 2d 696, 698, 171 P.2d 722.

(2) In considering the sufficiency of the evidence on a motion for a new trial, even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is the trial judge's duty to resolve such conflicts in determining whether the issue should be retried. (Williams v. Field Transportation Co., supra.)

In the present case plaintiff was injured when struck by an automobile driven by defendant Doyle L. Sutherland and owned by the other defendant. The jury rendered a verdict for plaintiff in the sum of $3,500.00. Dr. Evans, called as a witness by defendants, testified that he had examined plaintiff and that he could find no complaints referable to the injury which she had received; that his examination included neurological tests which were negative; and that in his opinion plaintiff did not sustain a concussion, and there was no reason why plaintiff should have stayed in bed longer than a week or two or remained away from school for a longer period. This testimony, being contrary to evidence given by plaintiff, raised a conflict in the evidence, the determination of which lay in the sound discretion of the trial judge whose duty it was to determine whether or not such evidence sustained the verdict which the jury had returned. If the trial judge believed Dr. Evans' testimony, as we must assume he did, then the verdict of the jury was excessive and the verdict was not sustained by the evidence.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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94 Cal.App.2d 747

BROWN v. BUTTS.

Civ. 3875.

District Court of Appeal, Fourth District, California.

Nov. 22, 1949.

Earle M. Brown sued Zelma Butts to quiet title to realty.

The Superior Court, Riverside County, Wm. D. Dehy, J., rendered a judgment for plaintiff from which plaintiff appealed.

The District Court of Appeal, Mussell, J., modified the judgment and as modified affirmed it, and held that it should have provided that plaintiff was the owner of realty subject to defendant's rights under a contract to purchase, and that defendant was entitled to a deed upon payment of sums due including interest within a reasonable time fixed by the court.

1. Appeal and error ⚿544(3), 907(3)

On appeal prosecuted on the judgment roll, a reversal cannot be ordered except for fatal error appearing therein; and the only question presented is whether findings support judgment; and findings must be given such construction as will uphold rather than defeat it; and appellate court will assume that issues upon which findings were made were properly before the court, and that evidence was introduced without objection which would support the findings as made.

2. Quieting title ⚿52

Where vendor brought action to quiet title to realty, and court found purchaser had paid certain sums on principal all of which had been credited to principal and none to interest, and vendor had paid taxes and insurance premiums, but had made no demand for payment of those amounts, and purchaser had tendered all amounts due, judgment should have provided that vendor was owner subject to purchaser's rights under the contract, and that purchaser was entitled to deed upon payment of principal, interest, taxes, insurance and costs due within a reasonable time fixed by the court.

3. Quieting title ⚿43

To entitle plaintiff in quiet title action to recover attorney's fees, there must be pleadings and proof to support such recovery, since such fees are in the nature of "special damages."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Damages".

4. Quieting title ⟾54

Where vendor of realty brought action to quiet title, and purchaser set up contract for purchase which contained provision for attorney's fees, court could deny such fees since action was not founded on the contract.

Porter C. Blackburn, Los Angeles, for appellant.

Harmon C. Brown, Riverside, for respondent.

MUSSELL, Justice.

Plaintiff appeals from a judgment in his favor in an action brought by him to quiet title to certain real property in the County of Riverside. On October 28, 1939, plaintiff, as owner, agreed to sell and defendant to buy the property involved for the total purchase price of $750.00, payable as follows: "$30.00 cash, receipt whereof is hereby acknowledged by said party of the first part, and the remainder of $720.00 to be paid in monthly installments of $10.00 per month, beginning November 28, 1939, said payments to be applied first on interest at 7% per annum on the unpaid balance of principal, and the remainder on said principal, with the further provision that when the balance of principal has been paid, the party of the first part agrees to make a deed to the said party of the second part". The agreement, which was in writing, contained provisions for the payment by the purchaser of fire insurance and taxes, and it was further provided therein that if an action was instituted thereon, the purchaser promised to pay such sum as the court might fix as attorney's fees.

The defendant took possession of the property and made the monthly payments due thereon until January 31, 1942, and upon several occasions subsequent to said date and within ninety days thereafter the defendant tendered and offered to pay plaintiff all sums due. Plaintiff refused the tendered payments and thereafter no further offer was made by the defendant until May, 1942, when all payments on principal then due were tendered and offered to plaintiff by defendant. Plaintiff refused this offer and filed the within action to quiet title. The complaint is in the usual form and the answer sets forth the agreement of sale and the refusal by plaintiff to accept the payments tendered shortly after January 31, 1942. It is alleged therein that on or about June 15, 1942, defendant again offered to fully perform her obligations under the contract; that the offer was again refused and that ever since said date plaintiff has refused to accept the payments due under the contract.

[1] No reporter's transcript has been filed herein and the appeal is prosecuted on the judgment roll alone. Under such circumstances, a reversal cannot be ordered except for a fatal error appearing therein. The only question presented is whether the findings support the judgment and the findings must be given such construction as will uphold rather than defeat the judgment. Oakley v. Rosen, 76 Cal.App.2d 310, 312, 173 P.2d 55. We must also assume that the issues upon which findings were made were properly before the court and that evidence was introduced without objection which would support the findings as made. Derrer v. Keeler Gold Mines, Inc., 63 Cal.App.2d 606, 611, 147 P.2d 102.

The trial court found that the defendant had paid the sum of $300.00 on the principal of said contract and that the plaintiff credited all the payments so made on the principal and none on interest; that plaintiff paid taxes on the property in the sum of $97.07 and insurance premiums amounting to $45.60, and that no demand was ever made by plaintiff for the payments of these amounts; that there was a balance of $450.00 due to plaintiff on account of the principal sum payments under said contract as of the 31st day of January, 1942, and that the plaintiff was entitled to the taxes and insurance payments, making in all a sum of $592.67. The court further found that the plaintiff was the owner of the property described in the complaint, subject to the rights of the defendant as the equitable owner thereof and subject to the payment of said sum of $592.67. The court found that on several occasions within ninety days subsequent to January 31, 1942, defendant tendered and offered to pay plaintiff the sum of $30.00 for the monthly payments due to the date of the offer, which payments were refused by the plaintiff. It was further found that the defendant, in the month of May, 1942, tendered payment of all accrued payments on principal at the rate of $10.00 per month but that plaintiff refused to accept the said payments so offered and that defendant made no offer of payment of any sum or sums under said contract thereafter. The judgment was that the plaintiff recover the sum of $592.67 from the defendant, upon receipt by defendant from plaintiff of a good and sufficient deed to the real property.

[2] It is apparent that under the terms of the contract the plaintiff was entitled to interest at the rate of seven per cent on the unpaid balance of principal from October 28, 1939, to January 31, 1942, and that the trial court erred in failing to include such interest in the judgment. It is also evident that the judgment is erroneous in that it does not fix the time for the payment by the defendant of the sums due on the contract or the date of delivery of the deed by plaintiff. Warden v. Nahas, 212 Cal. 740, 741, 300 P. 815; Bloom v. Bloom, 207 Cal. 70, 72, 276 P. 568.

[3, 4] The plaintiff contends that the trial court erroneously refused to allow him attorney's fees as provided in the contract. This contention is without merit. The court properly found that the plaintiff was not entitled to attorney's fees. Such fees are in the nature of special damages and to entitle plaintiff to recover therefor, there must be pleadings and proof to support such recovery. Prescott v. Grady, 91 Cal. 518, 522, 27 P. 755; Brook v. Forington, 117 Cal. 219, 221, 48 P. 1073. Furthermore, the action in the instant case is not founded on a contract providing for attorney's fees but was brought by plaintiff to quiet title to real property.

The judgment herein should have provided that the plaintiff was the owner of the property subject to the defendant's rights under the contract to purchase, Williams v. Rush, 134 Cal.App. 554, 560, 25 P.2d 888, and that the defendant was entitled to a deed to the property upon payment of the sums due on the contract within a reasonable time, which time should have been fixed by the court.

The judgment is modified by changing the amount awarded to plaintiff from $592.67 to $711.42, which said sum includes taxes, interest, costs, insurance premiums and balance of principal. It is further modified by adding a provision that plaintiff shall deed the property to the defendant when said amount is paid and that if said amount shall not have been paid by defendant within thirty days after the decision of this court becomes final, then in that event judgment shall be entered in favor of plaintiff quieting his title to the property. As so modified, the judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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94 Cal.App.2d 586

ADAMS et al. v. CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 14103.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1949.

Rehearing Denied Dec. 10, 1949.

See 212 P.2d 272.

Proceeding by John H. Adams and others, individually and as members of Automotive Machinists Lodge No. 1305, International Association of Machinists, against the City and County of San Francisco, a municipal corporation, Francis P. Walsh, John M. Kennedy and Harry K. Wolff, as and constituting the Civil Service Commission of the City and County of San Francisco and William L. Henderson, as secretary of the Civil Service Commission for a determination that plaintiffs were entitled to receive a vacation of two calendar weeks and sick leave and disability leave.

The Superior Court, City and County of San Francisco, Samuel F. Finley, J., entered judgment for the plaintiffs and the defendants appealed.

The District Court of Appeals, Ward, J., held that plaintiffs' vacations were to be determined by the provisions of the collective bargaining agreements of private industry and affirmed the judgment in so far as it declared that designated plaintiffs should be granted and allowed certain sick leave or disability leave with full pay and otherwise reversed the judgment with directions.

1. Master and servant ⚿69(6)

Under San Francisco charter providing that crafts employed by the municipality must be paid by the board of supervisors at the same "rate of pay" as might be established for such crafts by collective bargaining with private employers of industry in San Francisco, vacation periods set forth in such private bargaining agreements are part of the basic rate on which "rate of pay" is computed and period of vacation if any set forth is period that public employees must accept. St.1943, p. 3128, § 151; St.1947, pp. 3266, 3279, §§ 151.3, 153; Const. art. 11, §§ 8, 8½, 13.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Rate of Pay".

2. Statutes ⚿184, 196, 224

In ascertaining legislative intent, the purpose sought to be achieved by the statute is a factor under the rule that the latest provision in point of time or even in position of the ballot is controlling.

3. Constitutional law ⚿70(3)

It is not for the courts to pass on the wisdom or policy of a charter provision.

4. Master and servant ⚿69(6)

That section of San Francisco charter as amended provides that leaves of absence to officers and employees of city and county shall be governed by rules established by Civil Service Commission, that Commission by rule and subject to approval by board of supervisors shall provide for leaves of absence due to illness or disability, and that Commission authorized such leave with full pay, do not bring such payments within "rate of pay" provision of amended charter that crafts employed by municipality must be paid by board of supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers of industry in San Francisco. St.1931, pp. 3065, 3068, §§ 150, 152; St.1943, p. 3128, § 151; St.1947, pp. 3285, 3266, 3279, §§ 151.1, 151.3, 153.

5. Master and servant ⚿69(6)

Sick leave or disability leave pay is not a gratuity but is compensation paid to an employee in furtherance of "working conditions" inuring to the benefit of both employer and employee, and does not fall within the classification of "rate of pay" within San Francisco charter providing that crafts employed by municipalities must be paid by the board of supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers of industry in San Francisco.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Working Conditions".

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Dion R. Holm, City Attorney, William F. Bourne, Deputy City Attorney, San Francisco, for appellants.

Milton Marks, San Francisco, for respondents.

WARD, Justice.

This is an appeal by the defendants City and County of San Francisco and the members and secretary of the City and County Civil Service Commission from a judgment entered in favor of approximately 140 civil service machinist employees of the city and county, in which it was decreed by the trial court that plaintiffs should receive and defendants should grant to all of such employees who have had one year's service a vacation of two calendar weeks annually with pay "as long as Section 151 of the Charter of said City and County or any other section of the Charter provides for a vacation of two calendar weeks annually with pay after one year's service irrespective of the provisions of any contract or contracts entered into by and between

Automotive Machinists Lodge 1305, International Association of Machinists, and private employers with respect to the subject matter of vacations." It was also declared and decreed that irrespective of such contract or contracts the city and county should grant, allow and pay to plaintiffs "sick leave and disability leave." The above orders were made upon the theory that the allowance is "permitted, directed and guaranteed by the Charter of said City and County; that the provisions of Section 151 of the said Charter, with respect to vacations, and of Section 153 of the said Charter, with respect to sick leave and disability leave, apply to the petitioners and plaintiffs and to all other persons similarly situated; that the provisions of Part I, Sections 375 to 380 of the Municipal Code of the City and County of San Francisco, wtih respect to vacations, and Section 301, concerning sick leave and disability leave, and the provisions of Rule 30 and 32 of the respondents Civil Service Commission apply to the petitioners and plaintiffs and to all other persons similarly situated; that the provisions of Section 151.3 of the Charter of the City and County of San Francisco relate*s* to and provide*s* for the rate of pay of employees of the City and County of San Francisco and do not apply to, nor do they relate to, the allowance or payment of vacations, sick leave or disability leave." Mention of any question of fact on this appeal is merely incidental to the determination of the question of law, namely: do charter sections 151 and 153, or section 151.3, St.1943, p. 3128, St.1947, pp. 3279, 3266, or other sections determine, as to the employees here involved, the classification of pay for vacations and sick and disability leaves? The subject of vacations may be considered before that of sick and disability leaves.

It is necessary to refer to and quote portions of section 151 of the charter entitled "Civil Service" under the subtitle "Standardization of Compensation" which provides that "The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, as in this section provided, all salaries, wages and compensations of every kind and nature, *except pension or retirement allowances*, for the positions, or places of employment, of all officers and employees of all departments, offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county." (Italics added.) Certain positions are specified that "shall not be subject to the provisions of this section" which are not involved in the questions presented on this appeal,—for example, "teaching and other technical forces of the school department" and others specifically designated. Section 151 provides that the civil service commission shall prepare and submit to the board of supervisors a schedule of compensations and classifications for adoption by the board, which also "shall adopt amendments to the schedule" from time to time. The section further provides that "The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive *investigation and survey* concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state"; that "The commission shall * * * recommend a rate of pay for each such classification in accordance therewith"; and that "Where compensations for services commonly paid on an hourly or a per diem basis are established on a weekly, semi-monthly or monthly salary basis for city and county service, such salary shall be based on the prevailing hourly or per diem rate, where this can be established, and the application thereto of the normal or average hours or days of actual working time, in the city and county service, *including an allowance for annual vacation.* Every person employed in the city and county service shall, after one year's service, be allowed a vacation with pay of two calendar weeks, annually, as long as he continues in his employment." (Italics added.) With respect to San Francisco Charter section 151 it has been held that it is necessary there shall be a substantial compliance with a charter provision determining rates of pay for municipal employees but the rates of pay need not be identical with those fixed in private employment agreements. City and County of San Francisco v. Boyd, 22 Cal.2d 685, 140 P.2d 666.

It is admitted that the civil service commission in the adoption of rule 30 permitted a vacation of two calendar weeks and that the amount of compensation allowed would be the amount the employee would earn during his vacation period, if working at his current rate of pay. The *board of supervisors* approved the rule. This was in accord with charter section 151.

A proposed charter amendment was submitted to the electorate which was adopted in 1945, approved in 1946 by the Legislature, and amended as to procedure in 1947. The new section is designated section 151.3 and provides in part: "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the *board of supervisors* shall have the power and *it shall be its duty to fix such rate* of pay as compensations for such groups and crafts engaged in the city and county service." (Italics added.)

Defendants assert, without contradiction, the existence of the following facts: "1. that during all of the times mentioned in the petition and complaint petitioners and plaintiffs were automotive mechanics, automotive machinists and automotive body and fender workers in the civil service employ of the City and County of San Francisco; and, as members of Lodge 1305, Automotive Machinists, were within the 'groups and crafts' provisions of the Charter Section 151.3; 2. that during all of the times mentioned in the petition and complaint the collective bargaining agreement in force and effect throughout the industry and in San Francisco in establishments employing automotive mechanics, automotive machinists and automotive body and fender workers has provided for only five working days of paid vacation to employees with only one year of service in such employment; that under such same collective bargaining agreement employees in those groups and crafts are entitled to ten working days of paid vacation only after the completion of three years of service in such employment; * * *"

In a previous case involving holiday and overtime pay the quoted portion of section 151.3 was held constitutional. Cal.Const., art. XI, §§ 8, 8-½ and 13. In Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665, 670, it was stated: "The charter of a city is comparable to the Constitution of the state and governed by the same principles. [84 Cal.App.2d at page 441, 190 P.2d at page 671], * * * Section 151.3 does not purport to give the public employees the right to bargain collectively, or otherwise. By that section the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry. It is quite apparent that the 'collective bargaining' aspect of § 151.3 is subordinate and incidental to the 'rate of wage' aspect, and that the 'collective bargaining' aspect does not apply to the public employees. It is clear that the fixing of salaries of municipal employees is a matter of municipal and not general concern. [84 Cal.App.2d at page 443, 190 P.2d at page 670.]"

In addition to the constitutional questions, two special questions presented in Adams v. Wolff, supra, related to "holiday pay and premium pay on the night shifts." It was declared in that case 84 Cal.App.2d at pages 444-445, 190 P.2d at pages 671-672. "Section 151.3 requires the 'rate of pay' to be fixed in the manner there set forth. It is contended that this relates only to the 'basic' rate of pay, and that holiday and premium pay on night shifts does not relate to the 'basic' rate of pay but relates to 'working conditions,' and it is urged that the fixing of working conditions is beyond the scope of § 151.3. It is probably true that § 151.3 relates only to the 'basic' rate of pay and does not relate to 'working conditions.' But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself. * * * The 'basic' 'rate of pay' is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work."

[1] In brief, the "rate of pay" is the "take home pay" of those on the list of employees in good standing eligible for active duty. Section 151.3 does not purport to control or supervise the administrative functions of the government with respect to all matters pertaining to civil service employees. The new section is confined to "rate of pay" measured by hourly wage and indicates that "investigation and survey" were not abrogated but are subordinate to local collective bargaining agreements fixing the rate of pay recognized in the local industrial area in and around San Francisco. Pay for an unworked holiday is part of the basic rate of pay. Adams v. Wolff, supra. The number of holidays is designated in the private collective bargaining agreement. With equal right and authority may the same agreement control the number of vacation days. The *period of vacation,* if any, set forth in a private bargaining agreement is the period that the public employees must accept, for the reason that it is part of the basis upon which "rate of pay" is computed. Plaintiffs are bound by the provisions found in section 151.3 until or unless that section is repealed or modified.

Plaintiffs contend that the interpretation placed upon the charter section by the city officials shows an unwarranted discrimination solely against the members of one union and that the interpretation is illogical, irrational and would lead to absurd results. This court may deal only with the particular problems presented. The people of the municipality "determined how the wages of certain public employees shall be paid." Adams v. Wolff, supra, 84 Cal.App. 2d at page 442, 190 P.2d 665. In voting for the adoption of the later charter section it could hardly be contemplated that the provisions in the private bargaining contract for each of the various "groups or crafts" § 151.3, would be identical.

The citations relied upon by plaintiffs may be distinguished from the present case. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 68 S.Ct. 1186, 1194, 92 L.Ed. 1502, involved the question of what constituted the regular rate of pay which the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., requires to be used in computing the proper payment for work performed in excess of 40 hours in any work-week. The employees involved were casual and transient longshoremen and by the collective bargaining contract were to receive additional pay for working at irregular hours. This so-called "overtime" for working undesirable hours and the additional pay allowed for working on holidays were to be included in computing "regular rate of pay" by dividing the total wages received by the number of hours actually worked. The court distinguished cases where some provision had been made for excess compensation, and in the Bay Ridge case there were no vacation or unworked holiday problems and the collective bargaining contract did not provide for anything for the year. Mid-Continent Petroleum Corporation v. Keen, 8 Cir., 157 F.2d 310, decided that it was proper in computing overtime compensation under the Fair Labor Standards Act, where there was a fluctuating work-week, to subtract the hours the employee was absent because of illness. Merchant v. Sands Taylor & Wood Co., D.C., 75 F.Supp. 783, held the same where there was a fixed salary, stating that where the contract of employment is for a set weekly wage but the hours of work are variable or fluctuating the rate of pay for the week is the amount of pay divided by the number of hours actually worked. Such cases would seem to substantiate defendants' rather than plaintiffs' arguments. Two New York cases cited by plaintiffs also should be mentioned: Matter of Giannettino v. McGoldrick, 295 N.Y. 208, 66 N.E. 2d 57, and Jung v. City of New York, Sur., 76 N.Y.S.2d 235. Section 220 of the New York Labor Law, McK. Consol. Laws, c. 31, provided that the "wages to be paid for a legal day's work" to those workmen employed on public works should be the "prevailing rate of wage" paid in the locality. The court held that in establishing such wage no deduction could be made of vacation and pension benefits given city employees. The precise language of the statute on which these cases were based, i.e., "wages to be paid for *a legal day's work,"* in some measure distinguishes the cases from the one here under consideration, which involves, specifically, a rate of pay to be fixed by private bargaining contracts wherein holidays and overtime periods are considered as part of the basic rate of pay. (Italics added.)

[2] In Adams v. Wolff, supra, it was held that section 151.3 set up a standard of wages for workers in the same industry. This section was adopted subsequent to all other amendments relative to standardization of salaries. In ascertaining legislative intent the purpose sought to be achieved by the statute is a factor, Steen v. Board of Civil Service Commrs., 26 Cal. 2d 716, 160 P.2d 816, under the rule that the latest provision in point of time or even in position on the ballot is controlling, People v. Moroney, 24 Cal.2d 638, 150 P.2d 888.

Section 151.3 is a charter provision, an enactment by the people amending in part the basic organic law of the city. The holding in Adams v. Wolff, supra, that section 151.3 was intended to equalize take home pay and that holiday pay is a part of the basic rate of pay must be considered controlling, and forces a determination that vacation pay directly and with certainty affects the hourly, the weekly, the monthly or the yearly wage. This conclusion is fortified by the fact that in section 151 of the charter an "allowance for annual vacation" is specifically mentioned as being a factor to be considered in ascertaining the "salary" or "rate of pay" to be paid to employees. This factor is entitled to some weight in ascertaining what was intended by the "rate of pay" provisions of section 151.3, and leads to the conclusion that vacation allowances are included within the meaning of that concept.

A suggestion has been made that the argument which was presented to the voters might throw some light on the determination of the problem. The arguments pertinent to the precise question merely refer to standardization of salaries in accord with prevailing rates in private and governmental employment.

[3] It must be declared that by reason of the adoption of charter section 151.3 the city and county employee may accept not only the advantages provided thereunder but likewise must submit to the disadvantages that are incidental to its passage. The good must be accepted with the evil in changing the classification for "rate of pay" from the provisions of section 151 to those of section 151.3. "It must be remembered that it is not for the courts to pass upon the wisdom or policy of a charter provision." Adams v. Wolff, supra, 84 Cal.App.2d at page 444, 190 P.2d at page 671.

"Sick leave and disability leave" present a different problem. Section 151.3 provides "Notwithstanding any of the provisions of section 151 or any other provisions of this charter * * *." The term "any other provisions of this charter" might include section 153, or any section with a provision establishing the basis of standardization of compensation of certain employees engaged in "city and county service."

Section 153 of the charter, in effect since 1932, provides that "Leaves of absence to officers and employees of the city and county shall be governed by rules established by the civil service commission, * * *" Leaves of absence may be granted for various reasons, as set forth in the section, including service in the armed forces of the United States or the State of California in time of war, or in time of peace. The board of supervisors, on the recommendation of the civil service commission, may provide for "war effort leaves." Section 153 also provides that "The civil service commission by rule and subject to the approval of the board of supervisors by ordinance, shall provide for leaves of absence, due to illness or disability, which leave or leaves may be cumulative, if not used as authorized, provided that the accumulated unused period of sick leave shall not exceed six (6) months, regardless of length of service, * * *" In section 153 there is no provision that the board of supervisors may fix "salaries, wages and compensations of every kind and nature," as set forth in section 151, nor "rate of pay" as in 151.3. Under the terms of section 151.3 it is the duty of the board of supervisors to fix a "rate of pay" for "service," whereas under section 153 the rules of the civil service commission are merely subject to the approval of the board of supervisors. Civil service commission rule 32 reads in part: "The officers and employees of the City and County of San Francisco shall be entitled to sick leaves with full pay, and disability leaves in accordance with laws, rules and regulations of the *Retirement Board,* subject, however, in both instances, to the provisions of this rule." (§ 1.) "Officers and employees who are subject to the provisions of Section 153 of the Charter, and who have regularly occupied their positions continuously for at least one (1) year, shall be entitled to two (2) weeks' sick leave, with full pay, annually, during their occupancy of said positions; provided that where it is necessary for the appointing officer to employ and pay a substitute in the stead of an absentee who is paid on an hourly or per diem basis said sick leave shall be without pay for the first five (5) days. Such annual sick leave of two (2) weeks, with pay, when not used, shall be cumulative, but the accumulated unused period of sick leave shall not exceed six (6) months, * * *" (§ 4.) (Italics added.) Sick leave and disability leave are therein defined and the rule was approved by the board of supervisors in part I, section 301, of the Municipal Code (1939 Ed.).

It is admitted that the present private collective bargaining agreement does not provide for compensation for sick or disability leaves. Holiday pay, overtime pay and vacation pay all have some remote relation to "working conditions." This is true with respect to the number of hours an employee is required to work when that subject is considered separately from the amount of hourly wage he receives for work performed. There are two goals to be attained by the employer and employee in the promotion of the employee's welfare, namely, the fostering of better *working conditions* for the employee and *the opportunity for profitable employment.* The aims may be far apart or closely interwoven. The means to obtain the end may converge or diverge. In the present instance the amount to be paid for non-work on a holiday, a vacation period, or overtime is purely a financial problem and should not be confused with any humanitarian aspect of the charter such as provisions for sick or disability leaves. The purpose of the adoption of section 151.3 is to establish for "groups or crafts" a "rate of pay" "pursuant to collective bargaining agreements." Sick and disability leaves, § 153, are somewhat comparable to medical benefits. Charter § 172.1, St.1943, p. 3117. Civil service commission rule 32 provides for "sick leaves with full pay, and disability leaves in accordance with laws, rules and regulations of the *Retirement Board* subject" to certain definitions and limitations as therein set forth. (Italics added.) The retirement board has no authority to fix "rate of pay." On the contrary, it may be classified as a welfare board. Payment for sick leave is a benefit given as an allowance payment on a humanitarian basis in the interest of the employee's welfare.

[4, 5] The fact that sick leave is authorized by the civil service commission "with full pay" (rule 32) does not bring payment for sick leave within the purview of "Basis of Standardization of Compensations" establishing a "rate of pay." Under the rule hereinbefore quoted, sick leave

may be granted for two weeks annually; under certain circumstances it is necessary to pay a substitute, and when sick leave is not used it may be accumulated, but the accumulated unused period of such leave shall not exceed six months, Civ.Serv. rule 32, § 4. Overtime pay is for actual work performed which is definitely ascertainable as to time and amount. Holiday and vacation pay cover certain designated periods and may be ascertained as definitely as regular daily or hourly pay. The sick leave, in fact, may not be used for a number of years, or it may or may not be taken for a longer period than two weeks, subject to the period of accumulation. Payment for sick leave is too indefinite to form the basis of "rate of pay" though the real distinction may rest upon the fact that it is welfare pay. Sick leave or disability leave pay is not a gratuity. There is no vested right to such compensation until the happening of the contingency, namely, disability or sickness, as defined in civil service rule 32. It is compensation paid to an employee in furtherance of "working conditions" inuring to the benefit of both employer and employee, but does not fall within the classification of "rate of pay." This conclusion is strengthened by the internal arrangement of the charter itself. After providing for civil service examinations, method of appointment, etc., section 150 deals with certification of payrolls, St.1931, p. 3065. Then section 151, logically, provides with respect to "Standardization of Compensation"; section 151.1, St.1947, p. 3285, with the "Officers Subject to Salary Standardization"; and section 151.3 with "Basis of Standardization of Compensation of Certain Employees" there being no section numbered 151.2. These sections are all dealing with matters relating to compensation, i.e., rate of pay, of employees. Then section 152, St.1931, p. 3068, contains a complete change of subject. Its provisions relate to "Service Records." Section 153 then deals with "Leaves of Absence." This arrangement is some evidence that the drafters of the charter intended that leaves of absence should have no relation to the basic rate of pay, but relate to an entirely different class of compensation—welfare—which is referred to herein as "working conditions."

The judgment is affirmed insofar as it declares and decrees that designated plaintiffs should be granted and allowed certain sick leave and disability leave with full pay as prescribed in section 153 of the Charter of the City and County of San Francisco; rule 32 of the civil service commission, and part 1, section 301, of the Municipal Code. Otherwise the judgment is reversed. The trial court is directed to revise the findings and judgment to accord with the views expressed herein. Each side is to bear its own costs on this appeal.

PETERS, P. J., and BRAY, J., concur.

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94 Cal.App.2d 630

PEOPLE v. COHN.

Cr. 2544.

District Court of Appeal, First District,
Division 1, California.

Nov. 16, 1949.

Hearing Denied Dec. 15, 1949.

Paul S. Cohn was convicted in the Superior Court in and for the City and County of San Francisco, Daniel R. Shoemaker, J., of violating the statute against occupation of premises with betting paraphernalia for the purpose of recording bets on horse racing, and he appealed.

The District Court of Appeal, Bray, J., affirmed the judgment of conviction.

The appellate court held that the evidence sustained conviction, that testimony of police officers as to telephone calls to premises occupied by defendant was admissible, that exhibits seized at the premises were admissible, and that certain statements of the district attorney were not prejudicial.

Prior opinion, 205 P.2d 72.

1. Gaming 🔑75(2)

A violation of statute against occupying premises with paraphernalia for purpose of recording bets on horse races is complete when it is shown that accused occupied premises with papers and paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

2. Gaming ⚿98(5)

Evidence sustained conviction for occupying premises with paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

3. Criminal law ⚿386

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, testimony of police officers respecting telephone conversations at the premises occupied by defendant was admissible for limited purpose of proving, not the truth of what was said, but that the premises were being illegally used for taking bets on horse races. Pen. Code, § 337a, subd. 2.

4. Criminal law ⚿386

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, testimony by police officer as to conversations he heard over phone at premises occupied by defendant were not inadmissible on ground that they were hearsay as to defendant.

5. Criminal law ⚿673(2), 783(1), 1186(4)

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, testimony of police officers respecting telephone conversations at premises occupied by defendant should immediately upon defendant's request have been limited to the purpose of proving that the premises were being illegally used, and instruction 11 days later that the conversations were admissible for purpose of establishing character of activities carried on at the premises, though correct as far as it went, should have been more specific and detailed, but failure to so limit the testimony and so instruct was not prejudicial, in view of other abundant evidence of guilt. Pen. Code, § 337a, subd. 2; Const. art. 6, § 4½.

6. Gaming ⚿98(5)

Under statute prohibiting the occupation of premises with paraphernalia for purpose of recording bets on horse races, evidence that room was occupied and used by defendant as a place to receive bets is sufficient to convict, regardless of the source of the bets. Pen.Code, § 337a, subd. 2.

7. Criminal law ⚿1037(1, 2)

Failure to object to district attorney's argument at the time or to request court to instruct jury to disregard it precluded objection on appeal.

8. Criminal law ⚿386

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, where premises occupied by defendant contained telephones listed both to defendant and another person, and evidence gave rise to inference that other person was mythical and that telephones listed to other person were really owned and used by defendant and his employees, testimony in relation to long-distance incoming calls over telephones listed both to defendant and to the other person was admissible. Pen.Code, § 337a, subd. 2.

9. Criminal law ⚿472

In prosecution for occupying premises with paraphernalia for recording bets on horse races, testimony of an expert on bookmaking that pads and other paraphernalia seized at premises occupied by defendant represented materials used in making bets on horse racing was admissible. Pen.Code, § 337a, subd. 2.

10. Criminal law ⚿404(4)

Cards and sheets of paper or pads showing bets made on horse races or results of races run, seized at time of raid and arrest, were in "possession" of occupant, and were admissible, including torn card found in waste basket and card found in wallet of employee after arrest, though none of such evidence was found on occupant's person. Pen.Code, § 337a, subd. 2.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Possession".

11. Criminal law ⚷730(1)

Any error in statement of district attorney that he had power to and did screen felony cases and decided whether there was sufficient evidence to bring case to trial and that case never came to court if there was not sufficient evidence was cured by court's immediate instruction to disregard the statement.

12. Criminal law ⚷1171(1)

In prosecution for occupying premises with paraphernalia for purpose of recording bets on horse races, where jury could reasonably have inferred that person other than defendant in whose name certain telephones on the premises were listed was a myth, statement of district attorney referring to failure of defendant to produce other person as a witness, and inability of police department and staff of district attorney's office to uncover the other person, was harmless. Pen.Code, § 337a, subd. 2.

13. Criminal law ⚷865(1)

The action of the trial court in asking jury how it stood numerically, and when told "11–1" on one count, and again, "On one we have twelve", and in instructing the jury to return for further deliberation, was not coercive.

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Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, B. Abbott Goldberg, Deputy Attorney General, attorneys for plaintiff and respondent.

Leo R. Friedman, San Francisco, attorney for defendant and appellant.

BRAY, Justice.

Appeal by defendant Paul Cohn from a judgment of conviction of violation of section 337a, subdivision 2, of the Penal Code after jury verdict finding defendant guilty as charged in count one of the amended information, and from the order denying a new trial. The jury failed to reach a verdict as to defendant on counts two and three charging violations of section 337a, subdivision 4, and of conspiracy to violate these sections. The jury also failed to reach a verdict as to Cohn's codefendant Frank Low on any count of the information. Defendant's motion for new trial was denied and he was sentenced to San Quentin for the term prescribed by law.

Section 337a, subdivision 2, Penal Code, under which defendant was convicted, makes it a crime for any person to keep or occupy at any time whatever any premises with betting paraphernalia for the purpose of recording bets, purported bets, wagers or pools on horse racing. The section applies to any person doing any of the prohibited acts in a single instance as well as to one doing such acts as a business or occupation.

The main attack is on the claimed insufficiency of the evidence to support the verdict, and alleged error of the court in failing to instruct properly concerning the limited effect of certain evidence.

Defendant, doing business as the Bouquet Cohn Cigar Company, was proprietor of the Bonanza Cafe, 141 Montgomery Street, San Francisco, and of 13 cigar stores in San Francisco for which he had obtained licenses to operate pinball machines and off-sale liquor licenses, and on which he paid personal property taxes. It was the theory of the State that defendant was using the premises at 141–145 Montgomery Street as a central clearing house for bets made at the various cigar stores operated by him.

The Steil Building, in which the events leading to defendant's arrest transpired, is a four-story building facing Montgomery Street and bounded on the rear by Trinity Place. The Bonanza Cafe occupied the first floor; a suit of offices and a storeroom the second floor; a tailoring establishment the third; and a photostating business and reweaving service the fourth. The floors were connected by elevators and stairways. The State contended that the bookmaking activities took place in a suite of three small offices on the second floor near the rear of the building. There was also a large front office which was being renovated, and a storeroom containing supplies and beverages. This storeroom was admittedly used in connection with the tavern operated on the ground floor, and, Cohn contended, for no other purpose. In one of the small offices on this floor was a large table with three telephones, a wooden rack divided into partitions, each containing a pad of paper, and a smaller table with one telephone, wastebasket and two chairs.

On August 28, 1947, Special Investigator Hoy of the attorney general's office and Sergeant Hanlon of the San Francisco Police Department visited the premises and went to the second floor by elevator where they encountered Cohn. They introduced themselves and told him they had information that bookmaking was being carried on there. Cohn replied, "You don't see anything, do you?" The officers observed the three telephones on the large table and a fourth on a smaller table which was connected to a terminal box in the storeroom, also a fifth telephone located in another of the smaller offices and connected to one of the three telephones on the large table. Agent Hoy asked defendant if the telephones were his and he replied that they belonged to "Frank Peters" who was said to be in the advertising business but whose whereabouts defendant did not know. No bookmaking paraphernalia was observed on this visit. As the parties walked through the large front office Agent Hoy made the remark, "I guess this is probably where your one hundred dollar bettors may be—will be sitting around." The defendant laughed and replied, "There is more money in 'Acey-Deucey' bettors." On cross-examination Hoy testified that "Acey-Deucey" is a game played with dice.

On August 29, 1947, Hoy, Hanlon and Officer Keane of the San Francisco Police Department visited the premises. They found three telephones in the small office ringing busily. Officer Keane attempted to go up the stairway but found the second floor door locked. However, defendant came up the stairway, unlocked the door and went in with the officer. Hoy was answering telephones. A voice on one call said, "This is 15." When he said "O.K. Go ahead," the telephone was hung up. Another call began, "This is 6." When Hoy replied the party hung up. There were other similar calls. Hoy estimated that he answered 25 or 30 calls. The telephones rang continuously and sometimes all three rang simultaneously. "As fast as you could pick one [up] the other would be ringing. You couldn't answer them all at one time." Sergeant Hanlon and Officer Keane had similar experiences. One party asked for Paul. Defendant took the call and the conversation consisted of "yes" and "no." There was a long distance call for defendant on the telephone on the smaller table. Defendant took the call and there was a conversation in which he told the party on the other end of the line that "This place here is wired for sound." When he finished the telephone conversation he stated that the call was from "Del Mar," that he had a couple of horses running there. At one time at the request of Sergeant Hanlon, the defendant took a call on one of the telephones on the larger table, said "hello" three or four times and then made a remark to the effect that "You have got them so scared they don't even recognize their master's voice. The telephones kept ringing for about 20 minutes, becoming less frequent and finally ceasing. Hoy and Keane saw pads piled on the table but no writing other than the numbers at the botton ranging from 1 to 16. They saw no papers relating to "Frank Peters" or to any advertising business, and no "Frank Peters" ever appeared in these proceedings. The officers paid a third visit on the afternoon of August 29, when they found the elevator padlocked. They contacted defendant who unlocked the stair door. There was no activity nor were any papers visible.

On the morning of September 5, 1947, Hoy and Officers Overstreet, Talbot and Duggins of the San Francisco Police Department visited the premises. Hoy and Overstreet entered the second floor, through a window by means of a ladder, while Talbot went through the Bonanza Cafe to the stairway at the rear. As Hoy and Overstreet entered they heard a buzzer, scuffling of feet and a voice saying, "It is the cops. It is the cops." Talbot heard the sound of persons running. As Overstreet was entering he saw two men running; when he got in the men were gone. He unlocked the stairway door between the first and second floors and admitted Officer Talbot and Officer Duggins who was followed by defendant. On the third floor in the tailor shop, Giffen was found sitting on a sofa and Low was having a coat fitted which did not match his trousers, which was obviously too small for him, and on which the sleeves were 3 inches too short. Overstreet identified these men as the two he had seen running. Overstreet testified that when he saw the man he identified as Low running through the offices, Low wore a dark blue suit, while Hoy described it as dark brown. Low said that he was a clerk for Cohn. Low took off the coat and said to the tailor, "This is all right after you shorten the sleeves." (The next day Overstreet checked the tailor's book and found orders and measurements for suits for both Low and Giffen entered on September 5.) The men returned with the officers to the second floor. Hoy had found the receivers of three telephones off the hooks. When he replaced them they began to ring. The storeroom telephone listed to Cohn did not ring. Hoy answered one phone and a voice said, "This is Bill, and can I have 5 across on 428?" Then when the party asked for Roy or Frank and found they were out he hung up. Officer Overstreet had two similar conversations. He testified, "The man's voice said, 'This is Mission.' I said, 'O.K.' He said, '168, 3 to win. 174, 10 to win.' I repeated those numbers to him. I said, 'O.K.' and he hung up." Relating a later call, "The man's voice in answer to my 'Hello,' said, 'Is this Roy?' And I didn't say anything. He said, 'Is this Roy?' I said, 'Yes.' He said, 'What is the password?' I didn't say anything. I said, 'O.K. go ahead.' He said, 'What is the password?' I said, 'Roy is downstairs for a moment.' 'Where is Frank?' I said, 'He went downstairs, also.' I said, 'They both left without telling me the password.' He said, 'Is it O.K.?' I said, 'If it wasn't O.K., I wouldn't be here.' He said, 'All right.' He said, 'Give me 5 to win on 184 field.' I said, 'O.K.' Repeated it to him. I said, 'O.K.' and he hung up." Giffen and Low refused to write their names for the officers following a warning nod of defendant.

Defendant met Agent Hoy in the hallway and the following conversation was detailed by the officer: "Mr. Cohn told me, he said, 'I want to make one more plea to you.' I told Cohn that it was all up to the Police Department from now on, that it was their case. Cohn said, 'Well, anyway, it is worth a nice package to you.' I said, 'What do you mean?' He said, 'If you let those two fellows go in there and forget the whole thing, it will be worth a nice package to you.' And he said, 'You name it.'" Hoy was asked: "And yet on three prior visits, Mr. Cohn on each time had told you there was nothing in the premises so far as bookmaking was concerned, is that right?" and he answered, "Yes. I think the language was 'You didn't see anything.'"

On the occasion of their visit on the morning of September 5, 1947, the officers found and seized in the three rear offices on the second floor of the Montgomery Street property the following paraphernalia: One large clock; Three telephones; One extension telephone and switch box; One telephone; One extension cord and bell; Slotted box containing 14 pads of paper which contained records of bets placed on horse races; Copies of the Daily Bulletin and Sports Review; Run-down sheets; 62 sheets of paper containing records of bets made on horse races; 1 sheet of paper, the same being the run-down sheet for September 5, 1947. The slotted box was divided into partitions numbered from 1 to 16.

[1, 2] The recital of this evidence is a refutation of defendant's claim that there was insufficient evidence to support the verdict. It was said in People v. Abraham, 67 Cal.App.2d 425, 427, 154 P.2d 450, 451: "A violation of section 337a, subd. 2, is complete when it is shown that the accused occupied a place with papers and paraphernalia for the purpose of recording bets on horse races." Defendant's occupancy of the premises, the use of the telephones, and the presence of the racing sheets and betting paraphernalia all unite to complete the proof of violation of the statute. On this

there is ample authority. People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552; People v. Kelley, 22 Cal.2d 169, 176, 137 P.2d 1; People v. Vertlieb, 22 Cal.2d 193, 196, 137 P.2d 437; People v. Ines, 90 Cal.App.2d 495, 203 P.2d 540.

[3] Defendant originally contended that the telephone conversations testified to by the officers were inadmissible. However, at the argument, defendant admitted that they were admissible for the limited purpose of proving, not the truth of what was said, but that the premises were being illegally used for taking bets on horse races. That this is the law in California is well established. People v. Kelley, supra; People v. Vertlieb, supra; People v. Klein, 71 Cal.App.2d 588, 163 P.2d 71.

[4] Defendant insists that the court failed to instruct the jury properly concerning the limitations on this evidence. Early in the trial, witness Overstreet was asked to give the conversations he heard over the phone. Defendant objected on the ground that they were hearsay as to him. The court properly overruled the objection. Before the witness gave any of the conversations, defendant again objected. This time the court stated that they were admissible "to show the occupancy and use" of the premises for the purpose of betting. Defendant then objected that they were not admissible even for this purpose. He was overruled. Later witness Hoy was asked to relate the phone conversations he had heard. The defendant again objected and was overruled. Up to this point no request was made for an instruction to the jury. Defendant was in error as to his objection, and the court was correct in ruling that the conversations were admissible to show the use of the premises. Later, Officer Hanlon was asked concerning a telephone conversation. Again defendant objected to its admission, and when overruled, asked the court "to limit this particular type of testimony to be given by this witness to the fact that it not be considered here as being truthful as to what was heard over the phones or as evidence against either the defendants and can only be used for the purpose of determining the use to which the premises were being made, and not as to who was using the premises." The court replied: "No. I will not limit it. The instructions will cover that subject."

Officer Keane was asked to state the conversation he heard on the phone. Again the defendant objected and was properly overruled. Defendant thereupon asked the court "to make the same limitations on this testimony I have requested to be made to other conversations about these telephone conversations." The court merely replied, "Overruled." Approximately eleven days elapsed from the date of this occurrence until the court instructed the jury. In his argument to the jury, the district attorney referred to the fact that in the telephone conversations the speakers identified themselves by certain numbers which corresponded to the numbers on the pads and slotted box and which he argued were the designation of the various stores owned by Cohn. He also pointed out that the reference in the conversation to "Roy" and "Frank" meant Roy Giffen and Frank Low.

Defendant offered a properly worded instruction to the effect that these telephone conversations were "admitted solely and exclusively for the purpose of establishing the character of the activities being carried on at said premises and for no other purposes" and could not be considered by the jury "as in any way tending to connect either of the defendants with the crimes charged * * * [nor] as being in any way binding upon either of the defendants" nor "as establishing the truth of anything that was said by the other party to the telephone conversation." Instead of giving this instruction, the court, after discussing evidence which was received against one of the defendants only, stated, "there were other certain telephone conversations admitted in evidence for the purpose of establishing the character of the activities being carried on on the premises at 145 Montgomery Street. All telephone conversations in this case are so limited and will be so considered by you."

[5] As the evidence was admitted for a limited purpose only, the court, when requested by defendant so to do, should have instructed the jury immediately as to it lim-

ited effect. Likewise the court should have given the instruction requested by the defendant, rather than the more or less offhand instruction which it did give. Its instruction was correct as far as it went, but in view of the time which had elapsed since the evidence was heard, its failure to instruct at the time, and all of the circumstances of the case, it should have been more specific and detailed. People v. Cook, 148 Cal. 334, 83 P. 43; People v. Kane, 27 Cal.2d 693, 166 P.2d 285. But, having in mind section 4½ of article VI of the Constitution, there was no miscarriage of justice. There is abundant evidence that the premises were being used for the taking of bets and that defendant kept and occupied them for that purpose. The fact that defendant had access by a key which opened the locked door from his liquor storeroom to the small room where the telephone and gambling paraphernalia were kept; the fact that the fourth telephone in that room lead to a terminal box in defendant's storeroom which phone was listed in defendant's name; the fact that defendant received phone messages not only over this phone but also over the other phones listed in the name of "Frank Peters"; defendant's statement "You have got them so scared they don't even recognize their master's voice," and other statements made by him; the fact that although the three telephones are listed by the telephone company to "Frank Peters" there is no account in his name on the books of defendant's wife who is the owner of the building; the fact that the betting markers were in the handwriting of Low and Giffen, defendant's employees; the fact that the telephone bills for Peters were mailed to the same address as those addressed to Cohn; the fact that none of the tenants of the building ever saw Peters; the fact that found in the wastebasket in the little room was a card listing the phone numbers of the thirteen stores owned by defendant and also such a card was found on the person of Giffen; the inferences that reasonably can be drawn from the failure of defendant to take the stand, and from the failure of the wife to testify concerning the tenancy of the room in question—these and other matters leave no possible doubt of the defendant's guilt.

[6] In the absence of anything said over the phone there is sufficient evidence to justify the inference that the numbers on the slotted box were the numbers given to the various stores owned by defendant, and that the little room was the clearing house for bets coming from those stores. However, to convict defendant of the crime charged it was not necessary to prove that this was so. There was ample evidence that the room was occupied and used by defendant as a place to receive bets. That is all that is required to constitute the offense of which defendant was convicted. It is immaterial whether the bets came from stores of defendant or from some other source.

[7] Defendant made no objection to the district attorney's reference in argument to the telephone conversations at the time, nor did he request the court to instruct the jury to disregard it. Hence he cannot raise the question now. People v. O'Moore, 83 Cal.App.2d 586, 189 P.2d 554; People v. Horowitz, 70 Cal.App.2d 675, 161 P.2d 833; People v. Dye, 81 Cal.App.2d 952, 185 P.2d 624.

People v. Orcalles, 32 Cal.2d 562, 197 P.2d 26, is not applicable to the facts of this case. There the district attorney referred to a prior statement of a witness introduced for impeachment of that witness, as proof of the facts contained in the statement. The defendant objected, but the court, instead of then, or at any other time, explaining to the jury the purpose of admitting the statement, merely said that the jury were "the ones who are to determine what evidence has been presented." 32 Cal.2d at page 569, 197 P.2d at page 30. Later, the court refused to give an offered instruction on the subject. The court not only refused to limit the evidence, but in view of the language of other instructions, in effect instructed the jury that they might consider it for all purposes.

This case is easily distinguished from People v. Cook, supra, 148 Cal. 334, 83 P. 43, and People v. Kane, supra, 27 Cal.2d 693, 166 P.2d 285, so far as the effect of the failure of the court to instruct fully on the limited purpose of the phone conversations. Here, the portions of the phone conversations which were inadmissible against defendant did not appreciably add anything to the prosecution's case. In the Cook case, however, the evidence which it was sought to have the jury clearly understand was admitted for a limited purpose only, if not so applied by the jury, materially affected defendant's right to the plea of self defense. In the Kane case, the court's instructions left the application of reasonable doubt to, and the distinction between, robbery and grand theft, "either wholly unexplained or derivable only from inference." 27 Cal.2d at page 699, 166 P.2d at page 289.

[8] Defendant complains of the admission of testimony relating to long distance calls over the phones listed both to defendant and "Frank Peters." The most that this testimony showed was that identical persons sent long distance calls over the telephone listed to defendant and over those listed to "Frank Peters." There was a reasonable inference that "Frank Peters" was a mythical person and that the telephones listed to him were really owned and used by defendant and his employees for the purpose of receiving bets. The fact that two of the phones had been moved from the Russ Building where for approximately a year they had been listed to "Frank Peters," that during that period the bills therefor were sent in his name to that building, and that the listing always showed "Frank Peters" as an advertising concern and that the evidence failed to show whether the request for moving was in writing, did not overcome this inference. The testimony was properly admitted.

[9] Defendant complains of the admission of the testimony of an expert on bookmaking that certain pads and other paraphernalia seized at the premises represented materials used in making bets on horse racing. This point has been raised so frequently in these bookmaking cases, and so uniformly ruled adversely to defendants, that it is sufficient to cite People v. Newman, 24 Cal.2d 168, 174, 148 P.2d 4, 152 A.L.R. 365, where approval was given to People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693.

[10] Defendant objected to the introduction of certain exhibits which were seized at the time of the arrest. Generally these exhibits were cards, sheets of paper, or pads showing bets made on horse races or results of races run. Many were shown to have been made by defendant's employees. The fact that one of these cards was torn and in a wastebasket, and that none of the evidence was found on defendant's person, does not change the situation any. All were in his "possession" at the time of the raid. There was no error here. People v. Davis, 65 Cal.App.2d 255, 150 P.2d 474. Nor was there any error in admitting the cards found in Giffen's wallet after his arrest. He had been tied in to Cohn both because of his presence at the premises and because, admittedly, he was an employee.

[11] Defendant assigns as misconduct the statement of the district attorney: "You know your District Attorney has the power and does screen all the felony cases and he decides whether there is sufficient evidence to bring the case to trial or not. If there is not sufficient evidence the case never comes to court." Defendant assigned the statement as misconduct and asked the court to instruct the jury. Immediately the court instructed the jury to disregard it. This cured any error there may have been in making the statement.

[12] Misconduct is also assigned in the reference to the failure of the defendants to produce the witness "Frank Peters" and the inability of the very capable police department and staff of the district attorney's office to uncover him. The district attorney may have been overzealous in his praise, but his reference to the failure of the defense to produce the witness was unobjectionable. The evidence showed that the building was owned by defendant's wife, that her books failed to show a lease to "Frank Peters," that his name appeared only on the listed telephones which were

used by defendant and his employees. If such a person as "Frank Peters" existed defendant could either have produced him or shown that he was unable to do so. As the case stood at the time the statement of the district attorney was made the jury could reasonably have inferred that "Frank Peters" was a myth. The statement of the district attorney under the circumstances could not have been prejudicial. "It is undoubtedly the rule that the district attorney may comment upon the failure of the defendant to produce material witnesses who would substantiate his story." People v. Fitzgerald, 14 Cal.App.2d 180, 205, 58 P.2d 718, 731. Particularly is this so where as here the evidence shows that defendant and his wife must have known "Frank Peters," if he existed, fairly well, and defendant made no effort to account for his nonappearance.

[13] Finally it is argued that the trial court erred when it asked the jury how it stood numerically and when told "11–1" on one count, and again, "On one we have twelve" instructed the jury to return for further deliberation. The jury then returned with a verdict of guilty as to Cohn on the first count, and failed to reach a verdict as to him on the second and third counts. It also failed to reach a verdict as to Low on any of the counts. Whether an earlier failure to agree concerned both defendants or Low alone does not appear because there is uncertainty in the numbers used by the forewoman—whether she referred to the parties or to the three counts of the information. All parties were apparently content to risk a chance on the further deliberations of the jury and no objection was made to the procedure. The defendant now argues that this was coercive. The point is not well taken. People v. Curtis, 36 Cal.App.2d 306, 325, 98 P.2d 228 and cases cited. See also People v. Walker, 93 Cal.App.2d 818, 209 P.2d 834.

The judgment and order are affirmed.

PETERS, P. J., and WARD, J., concur.

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94 Cal.App.2d 599

PEOPLE v. 748 CASES OF LIFE SAVER CANDY DROPS et al.

Civ. 13938.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1949.

Proceeding by the People of the State of California against 748 cases of Life Saver Candy Drops, 15 boxes of Necco Wafers and 84 boxes of Collins Walnettos, to cendemn them as adulterated and misbranded, wherein Henry G. Walters claimed them as owner.

The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., entered a decree, from that portion of decree which found that Five Flavor Life Savers, Necco Wafers, and Collins Walnettos were adulterated and misbranded, and should be destroyed, the claimant appealed on the judgment roll alone, and from that portion of the decree which found that the Pep-O-Mint and Wint-O-Green Life Savers were neither adulterated nor misbranded and should be returned to the claimant, the People of the State of California appealed on a full transcript.

The District Court of Appeals, Peters, P. J., affirmed the decree on the claimant's appeal and reversed the decree on the state's appeal.

1. Appeal and error 🔑907(3)

Where appeal was on judgment roll along trial court's findings cannot be attacked as unsupported.

2. Food 🔑24

Candies which were stale, moisture and heat damaged, sticky and showed evidence of deterioration in consistency and flavor, were "decomposed" and "adulterated" within the statute. Health and Safety Code, §§ 26470(3), 26472(3).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Adulterated" and "Decomposed".

3. Food 🔑24

In order that food may be condemned it is not necessary that it be injurious to health, but it is sufficient if the food is decomposed within the statute. Health and Safety Code, § 26470(3).

4. Food ⚷24

Candies which were stale and had lost part of their flavor and in which sucrose had broken down into invert sugar were "decomposed" within the statute which means change in consistency color, flavor; separation into constituent parts or elements or into simpler compounds and were also "adulterated" within statute as well as "misbranded." Health and Safety Code, §§ 26459, 26472(3), 26490(1).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Misbranded".

5. Appeal and error ⚷1012(1)

Findings of trial judge which were contrary to testimony of appellee's own expert as well as the uncontradicted and unimpeached testimony of appellant's expert could not stand.

◆

Douglas M. Moore, San Francisco, for appellant and respondent, (Claimant) Henry G. Walters.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for plaintiff appellant and respondent, the People.

PETERS, Presiding Justice.

By this proceeding the State seeks to condemn certain candies owned by the claimant, Henry G. Walters, on the grounds that these candies are adulterated and misbranded. Originally included within the amended libel were 748 cases of Pep-O-Mint, Wint-O-Green and Five Flavors Life Savers, 15 boxes of Necco Wafers, 84 boxes of Collins Walnettos and 593 boxes of chocolate bars. After the seizure, by stipulation, the chocolate bars were destroyed, the claimant conceding that they were unfit for human consumption. The claimant, by answer, denied that the other candies were either adulterated or misbranded. The trial court found that the Five Flavors Life Savers, and Necco Wafers, and the Collins Walnettos were adulterated and misbranded, and ordered them destroyed. From this portion of the decree the claimant appeals on the judgment roll alone. The trial court also found that the Pep-O-Mint and Wint-O-Green Life Savers were neither adulterated nor misbranded, and ordered them returned to the claimant. From this portion of the decree the State appeals on a full transcript.

Facts.

The candies in question were manufactured in 1943, and sold to agencies of the United States for the use of military personnel over-seas. They were shipped to the South Pacific where they remained until May of 1946, subject to transportation and storage in a tropical climate. In that month a large quantity of candy and cookies were reshipped to the United States, part being the candies here in question. At Camp Knight, in Oakland, a duly authorized army official inspected the cargo and duly certified that, in his opinion, the candies were "unfit for human consumption because of decomposition, deterioration and weevil infestation." The officer also certified that the candies were fit for animal consumption and recommended that they be disposed of for that purpose. In due course, the army offered the candies for sale for animal consumption, the invitation to bid and the contract signed by the purchaser expressly stating that the candies were unfit for human consumption, and that the purchaser warranted that they would be used only as animal food. The contract contained a further provision that the candies, before they were removed from the army base should be denatured with fish oil under the supervision of army officials.

The S & L Sales Company, a firm engaged in the salvage business in San Francisco, purchased from the army a large quantity of these candies, including the candies here involved, subject to the above contract provisions, and at a price that was only a small fraction of the regular wholesale price. The company, in direct violation of its contract, removed the candies from the army base without soaking them in fish oil, and stored them in a basement of an apartment house. At that time—the fall of 1946—there was a shortage of candy in the civilian market, the manufacturers being compelled to pro rate the available supply among their customers. The S & L Sales Company decided to capitalize on this condition. Through its agent, Harry Lipson, a large portion of the candies purchased from the government were sold, in direct violation of contract warranties, for human consumption in the regular channels of trade at prices equal to or in excess of the regular wholesale price. The claimant, Henry G. Walters, a candy wholesaler and jobber, purchased from Lipson about $17,000 worth of candy, including the candies here involved. He testified that he was a bona fide purchaser for value without notice that the government had sold the candies as animal food only. He admitted that he knew Lipson had an unusual quantity of candy, particularly Life Savers, but stated that he made no inquiry as to where Lipson had secured the candy. He knew that it was army merchandise because the cases were stamped with army insignia. After purchasing the candy, many of the cases were damp, and Walters installed a number of electric fans in an attempt to dry the cartons. He made a spot check of the candy and came to the conclusion that 98 per cent of his purchase was saleable, and 2 per cent, mainly Five Flavors, was questionable. He sold 139,000 packages of Life Savers to jobbers, theaters and stores in and about San Francisco. The candies here involved are the balance remaining in Walters' possession on the date of the State's seizure.

It is worth mentioning that a local drugstore also purchased a large quantity of Life Savers from Lipson from the same lot that Walters had secured his candies. The State seized that candy, and the drugstore consented to its destruction.

The sales manager of the Life Savers Company testified that the average life of a Life Saver is one year; that the company always substitutes fresh packages for those more than one year old in the hands of its dealers; that he had compared fresh Life Savers with those purchased by claimant; that the latter were not salable; that under no circumstances would his company sell such a product; that his company had received many complaints from dissatisfied purchasers of the candy sold by Walters' customers.

After the seizure of the candies, specimens were delivered to and examined by the State Laboratory. § 26560 et seq., Health and Safety Code. The certificate issued by the laboratory after examination reads in part as follows:

"The results of the examination and analysis demonstrate that the said food shows the candy to be stale in flavor, and in some pieces no flavor at all. Material yellowed by age and heat.

"The said food is adulterated in that it is so packaged as to mislead and deceive the purchaser into the belief that it is a peppermint candy or wintergreen candy, as the case may be, whereas in truth and in fact it is a stale, aged, and heat damaged product."

Such certificates, under the provisions of the Pure Foods Act, "shall be prima facie evidence of the facts therein stated." § 26563, Health and Safety Code.

Evidence by Claimant's Experts.

Most of the evidence on both sides was directed towards the Life Savers. A chemist attached to the Chemical Laboratories of the Board of Health of San Francisco testified that in September of 1946, at the request of the drugstore that had purchased some of the candy from Lipson, he examined the candy; that he made an organoleptic test—one restricted to smell, taste, sight and feeling. His conclusion was that there was no foreign matter in the candy, that there was no evidence of infestation, and that the candy was fit for human consumption.

The claimant also produced a chemist attached to a private chemical analysis firm. As a result of an organoleptic test, he discovered that the Five Flavors were sticky and stale, but that the Wint-O-Green and Pep-O-Mint were fit for human consumption, but were less strongly flavored and had less lustre than the currently available product, and were stale. The Five Flavors would not cause illness. Bacteria tests revealed no infestation. He found no evidence that the flavors had terpenized, which is a process whereby orange or lemon oil breaks down as a result of oxidation, and causes the product to taste of turpentine. This witness made no tests of the sugar composition of any of the candies.

Evidence by the State's Experts.

An army officer connected with the Veterinary Corps, whose duty it was to examine and have tested all foodstuffs brought back from overseas, testified that he had had the candies here involved tested by army chemists; that the Five Flavors were sticky and soft; that the other Life Savers were stale; that in his opinion all of the candy was unfit for human consumption.

The Supervising Chemist of the State Division of Laboratories testified that the Five Flavors were terpenized from oxidation; that tests demonstrated that there was an inversion of sugars in all the candies, that is, the sucrose broke down into other types of sugar as a result of the candies being oxidized and subjected to excessive moisture and heat. In addition to the organoleptic test, he made a distilling test to ascertain the flavor qualities of the candies. That test disclosed that the candies, including the Pep-O-Mint and Wint-O-Green, had little or no flavor. In his opinion, eating of the Life Savers would have a detrimental effect on the health of some people because of the presence of an excessive amount of invert sugar. In addition to his findings that the Pep-O-Mint and Wint-O-Green Life Savers were stale and lacked flavor, he found that they were yellow instead of white in color, and that the sugar contained therein had inverted. In his opinion, all of the Life Savers were "decomposed," using that term in its scientific sense of "changed in composition."

Statutes Involved.

The California Pure Foods Act is to be found in the Health and Safety Code, sections 26450 to 26624. The main purposes of the Act are to prevent the manufacture and sale of adulterated or misbranded foods, including candies, and to prevent fraud against the public.

Section 26459 provides that: "The provisions of this chapter regarding the selling of food, shall be considered to include the manufacture * * * offer, possession, and holding of any such article for sale; the sale, dispensing, * * * of any such articles * * *."

Section 26470 provides:

"A food shall be deemed to be adulterated: * * *

"(3) If it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food; or

"(4) If it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; * * *."

Section 26472 provides: "A food shall be deemed to be adulterated:

"(a) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or * * *

"(3) If damage or inferiority has been concealed in any manner; * * *."

Section 26490 provides: "A food shall be deemed to be misbranded:

"(1) If its labeling is false or misleading in any particular; * * *."

Sections 26510 and 26511 prohibit the manufacture and sale of foodstuffs that are adulterated or misbranded. The State has the power to seize and quarantine any adulterated or misbranded food based on findings of the State Laboratory, § 26581, and if a court finds the food to be adulterated or misbranded it may order the food destroyed, § 26584, or condemned, § 26585.

Appeal by the Claimant.

As already indicated, the claimant has appealed, on the judgment roll alone, from that portion of the decree ordering the Five Flavors Life Savers, Necco Wafers and Walnettos to be destroyed. He offered no evidence at all as to the Necco Wafers and Walnettos. The trial court found that the Necco Wafers and Walnettos "are adulterated in that they are stale, moisture and heat damaged, soft and of abnormal consistency, and some of said candy is melted and adhering together." At to the Five Flavors Life Savers, the Court found that they are adulterated in that they "are stale, heat and moisture damaged, sticky, some of the orange and lemon drops are terpenized, and said candy shows evidence of deterioration and damage in its consistency and flavor, and is not a sound product." The Court also found that all three of the said candies are "misbranded in that they are adulterated as aforesaid and the labeling thereon is false and misleading."

[1-3] These findings are amply supported by the record. Moreover, since this appeal is on the judgment roll, these findings cannot be attacked as unsupported by the claimant. So far as the Walnettos and the Necco Wafers are concerned, under § 26563 of the Act, the facts stated in the State Certificate upon which the seizure was predicated are prima facie evidence, and the claimant offered no evidence to refute this prima facie case. As to the Five Flavors, the Court has not only found that they were damaged by the heat and moisture, but also that the candy is sticky and shows evidence of deterioration and damage in its consistency, and that some of the orange and lemon drops have terpenized. The sugar in this candy has been inverted. Definite chemical changes have taken place. Clearly, such candies consist "in whole or in part of a * * * decomposed substance" within the meaning of § 26470 (3), and such food has been adulterated in that "damage or inferiority has been concealed" within the meaning of § 26472 (3). In order that food may be condemned, it is not necessary that it be injurious to health. The comparable federal act, containing almost identical language with that found in the state statute, has been uniformly interpreted to permit the authorities to condemn if the food be decomposed, and no requirement exists that the decomposition must be to such an extent that consumption of the article would be injurious to health, nor is there any requirement that the article be unfit for food. Salamonie Packing Co. v. United States, 8 Cir., 165 F.2d 205; United States v. Two Hundred Cases of Adulterated Tomato Catsup, D.C., 211 F. 780; United States v. 1851 Cartons Labeled in Part H. & G., Famous Booth Sea Foods etc., 10 Cir., 146 F.2d 760. The findings here go far beyond a mere finding that the candy was stale. The candy is unpleasant to sight, being soft and sticky, and damaged by heat and moisture, some of it being melted and adhering together. The Five Flavors are unpleasant to taste, being terpenized. This is sufficient to sustain the findings that these candies were adulterated within the meaning of the statute, and should be destroyed.

Appeal by the State.

The problems here presented are somewhat different from those presented in the claimant's appeal. This appeal involves only the Pep-O-Mint and Wint-O-Green Life Savers ordered returned to the claimant by the decree. As to these candies, the trial court found that it was not true that they were "adulterated, or diseased, or contaminated, or filthy, or putrid, or decomposed, or otherwise unfit for food, or otherwise unfit for human consumption in any manner or at all"; and that it was not true that these two candies were "misbranded or that they are so packaged or labeled as to mislead or deceive a purchaser in any manner, or at all"; that it is not true that these two candies "are not first class merchantable stock."

The evidence has already been summarized. Claimant's testimony was almost entirely devoted to showing that these candies were fit for human consumption. As already pointed out, that is not the sole test as to whether they are adulterated. If they are decomposed, as that term is used in the statute, that is all that is required. The expert produced by the claimant testified that these candies were stale, had lost part of their flavor, and did not have the lustre of the currently available product. The uncontradicted evidence of the State's experts, who were the only ones who made chemical tests of the sugar content of the product, was to the effect that the sucrose in these candies, because of oxidation and because of being stored in the tropical heat and moisture, had broken down into invert sugar; that invert sugar could adversely affect the health of some people; that these candies had lost most of their flavor, and were yellow and lacked lustre. This evidence was not contradicted or impeached in any way. This witness also gave the only definition of the term "decomposed" that appears in the record. He testified, in response to the direct question suggested by the Court as to what is meant by the term "decomposed" in reference to foodstuffs, that "When we have a substance consisting of a number of items or substances all together in one mass, we consider that as composed. If we take one of these substances, change its consistency, its color, its flavor, or in any way, we have decomposed it; and that is our understanding of decomposition. That is a scientific definition of decomposition, it does not mean putrification, just a change." And in response to the direct question as to whether or not the samples examined "indicated a decomposition as compared with the commercial product you used as a control?" he replied: "They definitely showed evidence of decomposition." This above definition is substantially similar to the dictionary definition of the term. Webster's New International Dictionary, 2d Ed., defines "decompose," as "to separate or resolve into constituent parts or elements, or into simpler compounds * * * To cause disintegration of * * * to undergo dissolution."

[4] Tested by these standards, and there is no indication that the term was used with any different meaning in the statute, these Life Savers, based on claimant's and upon uncontradicted testimony, were adulterated in the sense that they were decomposed.

The same evidence, much of it introduced by the claimant, also demonstrates that these candies were adulterated within the meaning of § 26472(3), in that "damage or inferiority has been concealed in any manner". The contention of the claimant that this section applies only to the manufacturer is clearly without merit, in view of the language of § 26459 above quoted. The invert sugar was clearly concealed, as were the other defects caused by oxidation, moisture and heat damage.

There would also seem to be no reasonable doubt but that these candies were also misbranded within the meaning of § 26490 (1) in that "its labeling is false or misleading in any particular". The label "Life Savers" stands for a certain quality and type of goods. To represent as "Life Savers" a product in which the sucrose sugar has become invert sugar, that is stale and lost its flavor, is to misrepresent or to misbrand the product. Likewise, to represent as "Pep-O-Mint" or "Wint-O-Green" candies that no longer have those flavors, is to misrepresent the nature of the product.

Claimant places his main reliance on the case of In re McNeal, 32 Cal.App.2d 391, 89 P.2d 1096, which he contends holds that stale bread is not adulterated or misbranded within the meaning of the Sanitary Bakery Law of California. 1 Deering's Gen.Laws of 1937, p. 192, Act 610. The case does not go as far as claimant contends. It was a habeas corpus proceeding to test the validity of the conviction of petitioner for selling loaves of bread to which the label of the manufacturer was not attached as required by the act. The conviction was upheld. The statute was held to be constitutional. The case contains an interesting discussion of the general purpose and scope of such statutes aimed at preventing fraud and contamination in the preparation and sale of foodstuffs, and points out the necessity and importance of such legislation. Purely by way of general discussion, and by way of dicta, in one short paragraph of a ten-page opinion the Court stated, 32 Cal. App.2d at page 399, 89 P.2d at page 1101: "There is nothing in the act to prohibit the sale of so-called 'stale bread' which is wholesome, in the same manner that fresh bread may be sold. * * * The act does not prohibit the sale by either the manufacturer or a dealer of old or stale bread which is wholesome." The Court was not here considering whether a stale product was adulterated or misbranded, because those issues were not involved. Just what was meant by the two quoted sentences is not entirely clear. Products that have reached a certain state of staleness may be decomposed. In a standard text on the problems here involved—2 Food Regulation and Compliance by Herrick, p. 741, appears the following: "In considering these apparent evidences of decay, we find that different terms are applied to describe the state of decomposition in food products. For example, a product which is *stale* has been considered to be decomposed, although obviously not to such an advanced stage as to be putrid or *tainted*. Although these terms are quite unscientific it seems clear that the law encompasses foods of this description." (Italics the author's.)

We do not find it necessary to pass on the question in the instant case as to whether a stale product is adulterated or misbranded, for the reason that we are here presented with a product that is not only stale, but, according to the uncontradicted evidence, has lost much of its flavor, has lost its lustre, and in which, due to oxidation, moisture and heat, the sucrose sugar has become invert sugar. It would be an entirely too narrow interpretation of the act to hold that such a product may be sold to the public without violating the statute, which is aimed at not only preventing the manufacture and sale of contaminated and harmful foods, but also is aimed at preventing fraud in such sale and manufacture. Under the uncontradicted evidence, the fraud here involved was a clear violation of the provisions of the statute, and the candy should all be destroyed.

[5] It is of course true that the trial court has made findings as to these two candies in favor of the claimant, and that, during the trial, the trial judge saw and tasted samples of these candies. But this is not a case that involves a conflict of the evidence. A large portion of the evidence that demonstrates that these candies were adulterated and misbranded was given by the expert produced by the claimant. The other evidence above mentioned was given by the state expert who was the only one to test the sugar content of the candies. His testimony as to what these scientific tests showed stands uncontradicted and unimpeached. This being so, the challenged findings contrary thereto may not stand.

The portion of the decree from which the claimant appeals is affirmed; the portion of the decree from which the State appeals is reversed.

WARD and BRAY, JJ., concur.

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94 Cal.App.2d 751

STUCK v. BOARD OF MEDICAL EXAMINERS OF STATE et al.

No. 14132.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1949.

Proceeding by the Board of Medical Examiners of the State of California, and Richard O. Bullis and others, the members thereof, to revoke the license of Lewis Andrew Stuck to practice medicine.

The petitioner was found guilty by the Board of aiding an unlicensed person in the practice of medicine and surgery and in offering to procure an illegal abortion and his license revoked and from a judgment of the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., the petitioner appealed.

The District Court of Appeal, Ward, J., affirmed the judgment holding that the evidence justified the revocation of the petitioner's license.

1. Physicians and surgeons 🔑**11(3)**

Where one of the findings of the Board of Medical Examiners revoking a physician's license to practice medicine, for unprofessional conduct was not specifically attacked and physician failed to point out wherein the finding was erroneous, finding would be assumed to be true. Rules on Appeal, rules 13, 15(a).

2. Physicians and surgeons 🔑**11(3)**

In proceeding to revoke license of a physician for unprofessional conduct, question of the jurisdiction of the Board of Medical Examiners over the subject matter may be raised at any time during the pendency of the proceeding before the board, the superior court, or an appellate court. Government Code, §§ 11505, 11506(a).

3. Physicians and surgeons 🔑**11(3)**

In proceeding to revoke license of a physician for unprofessional conduct for aiding an unlicensed person in the practice of medicine and for offering to procure an illegal abortion, accusations sufficiently set forth the facts showing the jurisdiction of the Board of Medical Examiners over the subject matter and the person of the physician. Business and Professions Code, §§ 2360, 2377, 2378, 2392; Pen.Code, § 274; Government Code, §§ 11505, 11506(a).

4. Physicians and surgeons 🔑11(3)

A physician may submit himself to jurisdiction of the Board of Medical Examiners in a proceeding to revoke his license for unprofessional conduct if the board has jurisdiction of the subject matter.

5. Physicians and surgeons 🔑11(3)

In proceeding to revoke license of a physician for aiding an unlicensed person to practice medicine, an allegation that the unlicensed person owned the premises or the paraphernalia contained therein where the unlicensed acts were carried on was unnecessary.

6. Physicians and surgeons 🔑11(3)

Allegations of accusation charging physician with professional misconduct in aiding an unlicensed person to practice medicine which informed physician not only of the kind of act he aided and abetted, but in explicit detail, all of which resulted, as alleged, in physicians being guilty of unprofessional conduct was sufficient.

7. Physicians and surgeons 🔑11(3)

In proceeding to revoke the license of physician for procuring illegal abortions, dismissal of criminal charge involving principals in the abortions involving charges similar to those that appeared in the accusation against the physician were without direct bearing on action of the Board of Medical Examiners in revoking the license of the physician. Business and Professions Code, §§ 2377, 2378, 2392; Pen.Code § 274.

8. Physicians and surgeons 🔑11(3)

In proceeding to revoke license of physician for aiding and abetting an unlicensed person in the practice of medicine, where Board of Medical Examiners found the physician was an aider and abettor and the superior court made the same finding appellate court would disregard any reference to the conspiracy theory with other physicians charged with aiding the unlicensed person in the practice of medicine. Business and Professions Code, § 2378; Pen.Code, § 31; Const. art. 6, § 4½.

9. Physicians and surgeons 🔑11(3)

Evidence justified revocation of license of physician for aiding and abetting an unlicensed person in the practice of medicine and surgery and in offering to procure illegal abortions. Business and Professions Code, §§ 2360, 2377, 2378, 2392; Pen.Code, § 274.

10. Physicians and surgeons 🔑11(3)

A hearing by the Board of Medical Examiners for revocation of license of physician for unprofessional conduct need not be conducted according to the technical rules relating to evidence and witnesses, and any relevant evidence may be admitted, if it is the sort of evidence on which responsible persons rely in conduct of serious affairs. Government Code, § 11513(c).

11. Abortion 🔑1

The gist of the offense referred to as "abortion" is the intent to procure the miscarriage of any woman unless the treatment or operation is necessary to preserve her life. Pen.Code, § 274.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Abortion".

12. Appeal and error 🔑996

When a reasonable inference is based upon definite facts the appellate court will not substitute its own conclusions for those reached by the trial court.

◆

Richard M. Lyman, Jr., Oakland, Myron Harris, William H. Older, Oakland, for petitioner and appellant.

Fred N. Howser, Attorney General of the State of California, J. Albert Hutchinson, Deputy Attorney General of the State of California, for respondent.

WARD, Justice.

In July 1918 the petitioner and appellant, Lewis Andrew Stuck, was granted a license to practice medicine and surgery in the State of California. On the 12th day of May 1948 an accusation against him containing four counts of alleged unprofessional conduct was filed with the Board of Medical Examiners of this state. Counts numbered two and three were dismissed by the board and therefore do not merit consideration. Dr. Stuck was found guilty on counts one and four and his license to practice medicine in the State of California was revoked.

The first count in substance alleged that Dr. Stuck aided and abetted Samuel N. Stern, an unlicensed person, "in the practice of medicine and surgery * * * and the diagnosis of the conditions of human beings, as the same are defined" in the Business and Professions Code. Thereinafter the place, the dates, the names of eight or ten women, the physical condition and the "transaction" or diagnosis made by Samuel N. Stern relative to each woman are set forth in detail.

The fourth count charges that Dr. Stuck offered "to procure an abortion upon the persons of divers women" and that such abortions "were not then and there necessary to preserve the lives of the * * * women." Six names and the dates of the commission of the alleged acts constituting unprofessional conduct are thereupon set forth.

If the evidence is sufficient to sustain any one of the designated charges of aiding or abetting or the agreement or offer to procure a criminal abortion, Bus. & Prof. Code, §§ 2377, 2378, 2392; Pen. Code, § 274, the action of the State Board of Medical Examiners in revoking the license of Dr. Stuck must be upheld, § 2360.

[1] One of the board's findings is not specifically attacked. Petitioner fails to point out wherein the finding may be considered erroneous. With reference to a similar situation in regard to a demurrer, in Trabing v. California Navigation and Improvement Company, 121 Cal. 137, at page 139, 53 P. 644, at page 645, the court stated: "In appellant's brief only the special demurrer is considered, and we shall therefore assume the sufficiency of the complaint as against a general demurrer; * * *." Also, in Universal Insurance Company v. Manhattan Motor Line, Inc., 82 Cal.App.2d 425, at page 428, 186 P.2d 437, at page 439, it was declared by this court: "The second and third causes of action are not argued although the court found contrary to the contentions of plaintiff on all counts. Plaintiff states that of the three counts contained in the complaint 'the most important is the first, and it is to this count that the evidence was principally directed.' * * * There does not appear to be any argument or further reference to the subject matter in counts two and three. See Rules on Appeal, rules 13 and 15(a). In view of this circumstance, any claimed erroneous matter in connection with the last two counts may be deemed to have been waived. Romero v. Letts, 7 Cal.2d 503, 61 P.2d 449; County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501." (See 2 Cal.Jur. 728.) The finding herein may be accepted as true. It is stated as follows: "Samuel N. Stern at all times hereinafter mentioned possessed no license, certificate, or authority to practice medicine or surgery or any other healing art or to engage in the diagnosis of the conditions of human beings and the treatment of the sick and afflicted as the same are defined in the Business and Professions Code of the State of California, or otherwise."

In 1945 the Government Code provided for the acquisition of jurisdiction by a state board upon the service of an accusation, § 11505, plus a notice of defense that might be filed by the accused within fifteen days after such service upon him, § 11506. The "notice of defense * * * may (1) Request a hearing; (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed; (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he can not identify the transaction or prepare his defense; (4) Admit the accusation in whole or in part; (5) Present new matter by way of defense." 1945 Supp. § 11506, subd. (a). In the present matter a hearing was requested by appellant to permit him to present his "defense to the charges contained in said accusation."

[2-4] Assuming that subdivision (a)(2) of Government Code section 11506 may be considered to mean a general objection—the question of the board's jurisdiction over the subject matter—that question may be raised at any time during the pendency of the proceeding before the board, the super-

ior court or an appellate court. The answer to such an objection, so far as the facts of this case may be concerned, is found in Business and Professions Code, division 2, chapter 5, articles 1 to 16, inclusive. In brief, the board has power over the subject matter, though such question could be raised for the first time on appeal. Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 67 P.2d 1046. However, as the board is a tribunal of special jurisdiction the accusation should set forth its jurisdiction. The accusation in this proceeding sets forth facts showing the board's jurisdiction over the subject matter and the person of Dr. Stuck. In addition, Dr. Stuck submitted himself to the jurisdiction of the board, which is permitted if the forum has jurisdiction of the subject matter. 7 Cal. Jur. 598, § 17.

Subdivision (a)(3) of Government Code section 11506, permitting an objection to the form of the accusation on the ground that it is indefinite or uncertain, provides for a ground similar to that which may be raised on special demurrer before the board or the superior court. In the event that such an objection is meritorious the agency, in this instance the Board of Medical Examiners, may file or permit the filing of an amended or supplemental accusation. § 11507. Unless an objection is taken as provided in subdivision (a)(3), that is, to the form of the accusation, "all objections to the form of the accusation shall be deemed waived." § 11506, subd. (b). At this point it may be well to state that the decision in Reardon v. Daly City, 71 Cal.App.2d 759, 163 P.2d 462, cited by the board on this appeal, is not in point. In the Reardon case it was held that in a mandamus proceeding to restore a party to a public office the right to a public trial may be waived. It was there stated that rights might be waived the same as in a civil case. Nothing in that case is suggestive of the right of a party to waive jurisdiction over the subject matter.

[5, 6] Petitioner appellant contends that the accusation is fatally defective as a matter of law in that there is no allegation therein that appellant "knew or had any information" that "Stern was an unlicensed physician" or that he "owned, controlled, operated, conducted or was in any way connected with an establishment located at 330–15th Street, Oakland, California." Count one alleges that Dr. Stuck aided and abetted Mr. Stern, an unlicensed person, in the practice of medicine and surgery upon certain named human beings on certain dates at an establishment therein designated. There is no allegation that Stern owned, controlled or directed any others in the conduct of the designated office. Such allegation would have been surplusage, as under the facts set forth it was not pertinent whether Stern owned the premises or the paraphernalia contained therein. The facts of Bley v. Board of Dental Examiners, 120 Cal.App. 426, 7 P.2d 1053, on account of a different background are not in point on this particular issue. See 1 Cal.Jur.Supp.1942, Administrative Law, § 13, p. 34, and cited cases. The word "abet" not only means assistance or aid but "includes knowledge of the wrongful purpose of the perpetrator." 7 Cal.Jur. 889, 1 C.J. S., page 306, n. 6. By the allegations of count one the accused was informed not only of the kind of acts he aided and abetted, but in explicit detail, all of which resulted, as alleged, in Dr. Stuck being guilty of unprofessional conduct in the practice of medicine and surgery. See Smulson v. Board of Dental Examiners, 47 Cal.App.2d 584, 118 P.2d 483; Bley v. Board of Dental Examiners, supra.

There is a further objection to the sufficiency of the accusation in that "There is no allegation in the accusation in Count 1 that Stern, an unlicensed person, made a vaginal examination or gave a diagnosis of pregnancy on the persons named, wherein Stern was alleged to have been aided and abetted by appellant." Appellant is mistaken. In count one the names of the women involved, the type of examination, the diagnosis and subsequent treatment or operation are set forth in tabulated form. For instance, with respect to the first woman named in the accusation it is alleged that on July 30, 1946, a "Vaginal Examination and diagnosis of pregnancy" was made, and on August 1, 1946, an "Abortion by dilation and curretage" was performed. The same method of alleging the details relative to each named woman is followed throughout.

One more objection made by appellant may be noted as follows: "Referring to Count 4 of the pleadings we find that appellant is charged with offering to procure an abortion. Yet, in the findings of the Board relating to this count, the Board found the appellant guilty of agreeing or offering to procure an abortion. Such a finding as to agreeing or offering is fatal to the judgment of the Board * * *" Without attempting to distinguish the finely spun difference between agreeing and offering, as used in the findings, each of such terms may be said to mean that Dr. Stuck volunteered assistance in the commission of an abortion. However, the point is trivial.

[7] It appears that a criminal charge pending in Alameda County, involving some of the same principals and at least similar facts, was dismissed. The dismissal of a criminal charge involving charges similar to those that appear in the accusation has no direct bearing on the action of the board in revoking Dr. Stuck's license. As stated in Bold v. Board of Medical Examiners, 135 Cal.App. 29, at pages 34–35, 26 P.2d 707, at page 709: "We think it is clear * * * that proceedings before the board of medical examiners, instead of being criminal in character, are designed, rather, to protect the public by eliminating from the ranks of practitioners those who are found by members of their own profession to be dishonest, immoral, or disreputable. As was said in the Matter of Newell Smith, 10 Wend, N.Y., 449, quoted by the learned trial judge, in his memorandum decision upon the writ of certiorari: 'The trial and acquittal of the defendant upon the indictment for producing the abortion was no bar to this proceeding; they are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it.'"

[8] That Samuel N. Stern practiced medicine without a license and performed illegal abortions may be accepted as a proven fact. Appellant relies upon the claim that he did not know Mr. Stern and had not had any dealings with Stern directly. Two other licensed physicians and surgeons charged with aiding and abetting Stern in the practice of medicine and surgery were tried by the board jointly with Dr. Stuck. The theory of the attorney general is that the three accused were conspirators with Stern in practicing medicine without a license or in the performance of abortions. The Business and Professions Code provides that abetting the violation of or entering into a conspiracy to violate a provision of the chapter covering the practice of medicine constitutes unprofessional conduct. Ch. 5, § 2378. However, the original accusation against Dr. Stuck does not charge a conspiracy but is limited to the charge of aiding and abetting. Conspirators and abettors are classified as principals. Pen. Code, § 31. The board found that Dr. Stuck was an abettor. The superior court made the same finding. This court, therefore, will disregard any reference to the conspiracy theory and eliminate from consideration all evidence directed to the charge of unprofessional conduct against either of the two licensed physicians, Dr. Stock or Dr. Boge, who were charged with unprofessional conduct and tried jointly with Dr. Stuck. There may have been some connection between Dr. Stock and Mr. Stern, or Dr. Boge and Mr. Stern, but from the evidence presented herein there was nothing in common between either Dr. Stock or Dr. Boge personally in connection with the accusation against Dr. Stuck. However, it is reasonable to conclude that, irrespective of evidence directed against Dr. Stock or Dr. Boge, the board and the reviewing court were justified in the findings made against Dr. Stuck. As the record does not indicate that Dr. Stuck was in any way prejudiced by the procedure adopted and that the judgment of revocation of Dr. Stuck's license was not a miscarriage of justice, Calif.Const. art. VI, § 4½, this court may proceed to a consideration of the sufficiency of the evidence.

[9] The narration of a single tale of the alleged transactions on which the accusation was based demonstrates the propriety of the board's and the court's findings. The testimony of one of the women named in the accusation is substantially as follows: The witness met Dr. Stuck for the first time in August 1946, when she called at his office in the Latham Square Building, Oakland, California. On presentation of the evidence it was here stipulated that the witness identified Dr. Stuck. Upon entering the reception room of his office, the location of which she had ascertained from the building directory, she waited for a period and Dr. Stuck appeared. He invited her to come into a private office, whereupon she told him that she was pregnant and had come to him as she had heard that he might help her. Dr. Stuck "said no" but gave her a slip of paper, indicating an address for her to write down—330–15th Street, Oakland—where she was to go for the help she desired. He made no examination, asked no history of her condition, nor was any fee discussed. The next day, the 15th of August, the witness went to the address given her by Dr. Stuck and on entering the building she was met in the waiting room by a woman whom she described as appearing to be a nurse. The nurse took the witness into an inner office where they had some conversation as to the purpose of her visit, and when the witness mentioned she had come from Dr. Stuck, the nurse "called the doctor in." He proceeded to ask the witness some questions as to her condition, after which he made a vaginal examination and indicated that for a fee of $300 he "would perform a curettement." She made an appointment for the operation to take place at the same office on the following day. When she returned the next day she saw and talked to the same woman nurse and the same man, and paid to him the $300. Thereupon she was taken into another room, "sort of an operating room," and in the presence of the nurse the curettement was performed. The witness stated that she was conscious during the operation, that the pain experienced "was kind of general" but felt as though it were being performed "by scraping" in the region of her uterus. The "scraping effect" was detected by the patient "Both by feeling it and sounds"—she "could hear it." Toward the end of the operation she felt "a cramp-like pain" and when the operation was concluded she went into a small room in the office quarters where she "laid down for a while." On being questioned as to whether since that date she had given birth to a child, the witness replied in the negative.

[10] The facts just related constitute evidence sufficient to sustain the finding of the truth of the accusation in counts one and four. It is not necessary to repeat the story of any of the other women designated in either count. The conclusion reached herein is, in part, based upon code provisions and the views of the Supreme Court of this state. "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Gov. Code, 1945 Supp. § 11513(c). "Where * * * the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law." Webster v. Board of Dental Examiners, 17 Cal.2d 534, at pages 537–538, 110 P.2d 992, at page 995.

[11] Since 1935 the gist of the offense commonly referred to as abortion is the intent to procure the miscarriage of any

woman unless the treatment or operation is necessary to preserve the life of such woman. Pen.Code, § 274; Rinker v. State Board Medical Examiners, 59 Cal.App.2d 222, 138 P.2d 403; People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802. There is no evidence in this case that either Mr. Stern or Dr. Stuck gave any consideration to the necessity of preserving the life of any woman operated upon with intent to procure an abortion. Some of the women named in the accusation were not aborted. In such instances only a vaginal examination was made, which also is part of the practice of medicine and surgery. Stern, an unlicensed person, was guilty of that offense, and Dr. Stuck assisted and abetted him by procuring women for examination, diagnosis and treatment.

In each instance of the "transactions" included in the present accusation, Dr. Stuck supplied the patient to Stern. The fact that there is no evidence that Dr. Stuck knew Stern is of no consequence. Dr. Stuck had been told that each of the women was pregnant and desired an abortion. If Dr. Stuck sent a woman to an address where he believed an abortion establishment was being conducted, it is immaterial that the abortion was procured by "A" if Dr. Stuck intended that the operation should be performed by "B". In the reference by a licensed practitioner of persons for diagnosis or treatment of a condition of the human body, it is incumbent upon the licensed practitioner to protect the prospective patient from an unlicensed practitioner. In the present case, when all the evidence is considered, a reasonable inference may be drawn that Dr. Stuck knew that the diagnostician and operator at the 15th Street address was an unlicensed practitioner. On occasions when one or more of the witnesses so referred had asked Dr. Stuck whether the person at the given address "was an M.D.," Dr. Stuck had replied "he thought so."

[12] When a reasonable inference is based upon definite facts the appellate court will not "substitute its own conclusions for those reached by the trial court." Webster v. Board of Dental Examiners, supra, 17 Cal.2d at page 540, 110 P.2d at page 996.

The judgment rendered against the petitioner and appellant is affirmed.

PETERS, P. J., and BRAY, J., concur.

94 Cal.App.2d Supp. 978

ZELLNER et al. v. REEVE et al.

No. 153995.

Appellate Department, Superior Court,
San Diego County, California.

Oct. 7, 1949.

J. W. Zellner and Marie G. Zellner brought action against Archie L. Reeve and others to recover for money had and received as down payment on purchase price of realty which plaintiffs had contracted to purchase.

The Municipal Court of the City of San Diego, California, A. F. Molina, J., rendered a judgment for plaintiffs and the defendants appealed.

The Superior Court, Burch, J., reversed the judgment, holding that there was a binding contract for purchase of realty, that plaintiffs were not entitled to be relieved from forfeiture of downpayment, and that plaintiffs' case against the vendors' agent was no better than that against the vendors.

1. Vendor and purchaser 🔑17

Where prospective purchaser of realty made a firm offer to purchase in terms that were clear and explicit, and owners of realty accepted offer in exact accordance with its terms, a contract resulted, though prospective purchaser, before making the offer, explained to agent of owners that he expected to raise the money by the sale of certain property. Civ.Code, §§ 1584, 1585.

2. Damages 🔑81

Where vendors were not shown to be in default, and there was no evidence from which court could set off vendors' damage because of breach by purchaser of contract to purchase, there was no showing that vendors were unjustly enriched by retaining downpayment as liquidated damages in accordance with contract, and therefore purchaser was not entitled to relief under statute providing for relief from forefeiture. Civ.Code, §§ 3275, 3307.

3. Principal and agent ⚷136(4)

Where vendors' agent applied money received from purchaser on contract for account of vendors in accordance with the purposes of the purchaser at the time, and vendors, on default of purchaser, retained such money in accordance with terms of contract as liquidated damages, agent was not liable to purchasers for amount of such money, and fact that purchasers would not have been liable to agent even after their default, did not enlarge their rights against the agent.

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Colin M. Gair, Jr., Escondedo, for appellants.

Homer H. Bell, Monrovia, for respondents.

BURCH, Judge.

This is an appeal by the defendants from a judgment against them for $995.00. The complaint, so far as pertinent, avers that on June 7, 1947 (*sic*), the defendants were indebted to the plaintiffs in the sum of $2,000.00 for money had and received for the use and benefit of plaintiffs. The answer of C. D. Bandy and J. Claude Wilson deny each and every allegation contained in that cause of action, as does the answer of Archie L. Reeve and Roberta H. Reeve. From the judgment in favor of Bandy there is no appeal.

The findings of fact are that on or about June 7, 1947, defendants Archie L. Reeve, Roberta H. Reeve, and J. Claude Wilson, and each of them, became indebted to plaintiffs in the sum of $1,990.00, for money had and received by said defendants, and each of them, for the use and benefit of the plaintiffs; that on or about March 31, 1948, plaintiffs demanded payment thereof from defendants, and each of them; that no part of said sum has been paid. As conclusions of law the court found that plaintiffs are entitled to judgment against the defendants Archie L. Reeve and Roberta H. Reeve in the sum of $995.00, and are entitled to judgment against defendant J. Claude Wilson in the sum of $995.00, with interest on said sums from March 31, 1948, at the rate of seven per cent (7%) per annum.

The plaintiffs introduced in evidence an "Offer to Purchase Real Estate", signed by J. W. Zellner as purchaser and signed by Archie L. Reeve and Roberta H. Reeve as sellers. Among other things this document included a receipt of $2,000.00 for money paid to J. Claude Wilson as an agent, and stipulated that additional cash of $13,000.00 would be delivered,

"* * * on or before 60 days from date; and balance of $14,500 to be paid at rate of $2000 per annum for 4 years when buyer will give a trust deed for $6500 payable $1300 per annum until full amount of $29500 has been paid. Balance to bear interest at 5% per annum. Buyer has option of paying more instalments at any time. Furniture & tools included in price. Price includes 700 shares of Escondido Mutual Water Co. B stock, and crop now on the trees."

The document further stipulated time to be of the essence and that upon failure to complete the purchase according to the terms, the money paid on account "shall, at the option of the seller, be retained as liquidated damages".

We have read the record and are unable to see how the findings or the conclusions thereon are justified by the evidence or upon what theory the judgment in favor of plaintiffs for $995.00 against the sellers and for $995.00 against the agent can be sustained. J. W. Zellner acted for both plaintiffs.

As regards the sellers, the evidence shows that the money ($2,000.00) was paid in accordance with the written instrument introduced in evidence, and applied on account of the purchase money and that no other sums were paid by plaintiffs. Failure to pay the sum of $13,000.00 on the specified dates was a breach if a contract was made.

Plaintiff Zellner himself testified (Rep. Tr. p. 7) with reference to the execution of the document as follows:

"I said, 'I may be sticking my neck out, but I think that deal ought to go through. They have been trying to buy it (my Los Angeles property) for about a year and a half.' * * * I laid the check on the table ($2,000.00 check). Mr. Wilson wrote out the offer to purchase and I then signed it."

[1] At no place in the record is there any evidence of fraud, misrepresentation, or mistake. On the contrary, the evidence shows that the plaintiff Zellner himself wrote upon the $2,000.00 check, "Dep. on Reeve Property", and further, that he endeavored to dispose of his Los Angeles property with a view to raising the cash which he had become obligated to pay under the contract on August 9, 1947; that he maintained communication with the office of defendant Wilson as representative of the vendors, the Reeves; that he learned the crop had been segregated to his use under the contract; that when he found he would be unable to keep his covenant to pay $13,000.00 on or before sixty (60) days, he accepted an informal extension of his obligation to the date of August 24, 1947. The defendants also considered themselves bound. Not only did they grant the extension, segregate the fruit and hold their property off the market, but they promptly, upon acceptance of the offer, deposited the $2,000.00 with the Bank of America as escrow agent, and signed escrow instructions as sellers in accordance with the terms of the contract, and sent a copy of the instructions to the plaintiffs for signature after notifying them of the acceptance of their offer. The plaintiff was the master of his own offer. Its terms are clear and explicit. When it was accepted in exact accordance with its terms a contract resulted. Civil Code, Sections 1584, 1585.

We need not speculate upon whether his offer would have been accepted had plaintiff made it conditional upon the sale of his Los Angeles property, for, with the power to provide, he chose to make a firm offer. His testimony, which we have quoted, forcibly indicates his conscious intention to assume the risks of the future event. It is true that before making his offer he explained to Mr. Wilson that he expected to raise the money by the sale of his Los Angeles property, and it is also true that after he bound himself by contract he continued his efforts to that end and that his efforts failed. In the circumstances, a contract having been made, these efforts must be considered in relation to the contract as made, rather than to a condition the occurrence of which would have been necessary to create a contract.

In argument plaintiffs' main reliance is upon Section 3275 of the Civil Code. That section provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, *upon making full compensation to the other party,* except in case of a grossly negligent, willful, or fraudulent breach of duty." (Emphasis added.)

In the very recent decision of Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, 370, the court said:

"Section 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application. (Citations.) It has therefore consistently been held in the absence of proof of such facts, that once his default is established the vendee cannot recover back the part payments he has made. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 11, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17." (Other citations.)

[2] It is very clear upon reading the record here that the plaintiffs do not qualify for relief under Section 3275. It is equally clear that no evidence whatsoever is offered to show that the vendors were in default. Equally important is the fact that the record contains no evidence from which the court could set off the damage, if any, which occurred to the vendors because of the breach. Civil Code, Section 3307. Hence the vendees have not proved

that the vendors are unjustly enriched. See Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, supra.

[3] The case against defendant Wilson is no better than that against the sellers. There is no evidence in the record of fraud, actual or constructive, nor of mistake. He applied the money received from the plaintiffs upon the contract for the account of the vendors, which accorded exactly with the purposes of the plaintiffs at the time. As to what claims Wilson may have had against the vendors, the record is silent, but once Wilson turned the money over to apply on the contract he ceased to be liable to plaintiffs except for mistake, collusion, or other fraud. Becsey v. California Title Insurance and Trust Company, 192 Cal. 632, 221 P. 356; Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736; Weiner v. Roof, 19 Cal.2d 748, 122 P.2d 896. The fact that plaintiffs would not have been liable to the broker even after default (Hunter v. Vernon, 85 Cal.App.2d 525, 193 P.2d 139) does not enlarge their rights against the broker or alter the rule of the Becsey case, supra.

For the reasons above given, the judgment is reversed.

TURRENTINE, P. J., and GLEN, J., concur.

34 Cal.2d 449

PEOPLE v. SMITH.

Cr. 4998.

Supreme Court of California, in Bank.
Nov. 18, 1949.

William Charles Smith was convicted in Superior Court, Marin County, Edward I. Butler, J., of the unauthorized bringing into a state prison of a drug for the use of prisoners and he appealed from the judgment and from the order denying motion for a new trial.

On defendant's application for an order to direct court reporter to prepare transcripts in the trial proceedings at expense of state, in addition to clerk's record and normal reporter's transcript.

The Supreme Court, Shenk, J., issued the order as prayed, holding that rule of Judicial Council affording a free transcript to an appealing defendant in a criminal case was valid.

Edmonds, J., dissented in part.

Prior opinion, 205 P.2d 444.

Criminal law ⚿1077

A defendant appealing from a judgment of conviction is entitled to a reporter's transcript at the expense of the state as authorized by rule of the Judicial Council as against claim that provision affording a free transcript is a matter of substantive law not within the power of the Council, since adoption of the rule was merely a recognition of the law existing when the rule-making power was exercised. Code Civ.Proc. §§ 269, 274; Rules on Appeal, rules 33(a), (b), (3), 35(b); Pen.Code, § 1247k; Const. art. 6, § 1a, and (5).

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Wm. E. Ferriter, S. Lee Vavuris, San Francisco, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, A. E. Bagshaw, District Attorney, Marin County, San Rafael, for respondent.

SHENK, Justice.

This is an application for an order to direct the court reporter to prepare transcripts in the trial proceedings. The question is whether under the law a defendant appealing from a judgment of conviction is entitled to the reporter's transcript at the expense of the state.

On November 12, 1948, in the superior court in Marin county, the defendant was convicted of a felony (violation of section 4573.5 of the Penal Code, unauthorized bringing into a state prison any drug including benzedrine for the use of prisoners). He was sentenced and placed on probation for five years, the first year to be spent in the county jail. He appealed from the judgment of conviction and from an order denying his motion for a new trial. With his notice of appeal he requested, as an addition to the clerk's record, a transcript of the proceedings on motions and all written instructions; and, as an addition to the reporter's transcript, all instructions which could not be copied by the clerk, the opening and closing arguments of the district attorney, and the exhibits. Rule 33 (b), Rules on Appeal, 22 Cal.2d 1, 23. In the request he stated that on the appeal he relied on errors in the giving of instructions and in the refusal to give requested instructions, and on misconduct of the district attorney.

The trial judge denied the defendant the right to the reporter's transcripts on the ground that the defendant had declined to take the pauper's oath. The reporter refused to make any transcription without a court order or the payment of the fees prescribed by section 274 of the Code of Civil Procedure.

The defendant thereupon filed the present application for an order directing the reporter to prepare the normal transcript and the additional transcript pursuant to Rules 33(b) and 35(b) of the Rules on Appeal. In support of the application he relies on Section 274 of the Code of Civil Procedure, section 1247 of the Penal Code enacted in 1909 as amended and as subsequently incorporated in the Rules on Appeal, and on the recognition of the right to the requested transcripts without cost to him contained in Re Paiva, 31 Cal.2d 503, 190 P.2d 604.

The People, relying on Richards v. Superior Court, 145 Cal. 38, 78 P. 244, decided in 1904, and despite contrary opinions of the Attorney General (Atty.Gen. Ops.N.S. 784, 1937; 8 Op. Atty.Gen. 323, 1947; cf. 4 Op. Atty.Gen. 258, 1944), contend that the expense of the reporter's transcript on appeal falls on the defendant unless the trial court, exercising a discretion based on the defendant's inability to pay, orders otherwise. No question is raised as to the propriety of the present proceeding for an order directed to the reporter.

Section 269 of the Code of Civil Procedure, Stats.1903, p. 234, not since amended, provides for phonographic reporters in the superior court who at the request of the court or either party in civil or criminal matters must take down the proceedings and when directed by the court or either of the parties must transcribe the same within a reasonable time and file the transcription with the clerk.

When the Richards case was decided in 1904, section 274 of the Code of Civil Procedure, Stats.1903, p. 234, stated the fees which the official reporter should receive for his services for reporting and for transcribing, and then provided that in criminal cases the fees for reporting and for transcripts ordered by the court must be paid out of the county treasury; that in civil cases the fees for reporting and for transcripts ordered by the court must be paid by the parties in equal proportions, otherwise by the party ordering the same, and that no reporter could be required to perform services in a civil case until his fees had been paid to him or deposited with the clerk of the court. Changes by amendment to that section do not affect the present inquiry since the pertinent portions have continued substantially the same.

In 1904 section 1246 of the Penal Code provided that a clerk's transcript on appeal be prepared without charge. There was no provision at that time dealing with any duty of the court or the reporter regarding a reporter's transcript in criminal cases except the provision of section 274 of the Code of Civil Procedure.

In the Richards case, 1904, supra, 145 Cal. 38, 78 P. 244, the superior court denied the appealing defendant's request for an order to the reporter to prepare the transcript. The defendant applied for the writ of mandate. This court considered section 274 of the Code of Civil Procedure and recognized that when the trial court made an order pursuant to that section the fees to be paid the reporter were a proper charge against the county treasury. But in refusing the writ it was held that the statutory exemption of the defendant from the cost of the transcription depended on court order and that the court had discretion to deny the request when the defendant was able to pay for the service.

In 1909, Stats.1909, p. 1084, section 1247 was added to the Penal Code. Then and as amended in 1911, Stats.1911, p. 692, the material portions thereof provided that on an appeal a defendant might file an application with the trial court stating the grounds of the appeal, the points upon which he relied, and the portions of the reporter's notes necessary to be transcribed in order fairly to present the points relied on. The court was required within two days to make an order designating the portions to be transcribed but if the court failed within that time to issue the order the reporter was required to make the transcription as requested.

It is unnecessary to conjecture whether the foregoing addition to the Penal Code was for the purpose of overcoming the effect of the decision in the Richards case, but it may well be concluded that it did so. That is to say, the requirement for a court order within the specified time and in the absence thereof the mandate that the reporter make the transcription as requested, operated to provide a transcript at state expense pursuant to section 274 of the Code of Civil Procedure.

In the Richards decision the court gave no consideration to the effect of the provisions of section 274 requiring payment of the cost of the reporter's transcript by the parties in civil matters and omitting requirements for the payment of that cost by the defendant in a criminal case. If as indicated by the Richards decision the effect of that language was not clear, section 1247 of the Penal Code clarified the legislative intention as expressed in section 274 to the effect that the defendant in criminal cases was not to bear the cost of the reporter's transcript and was entitled to it as a matter of right subject only to the discretion of the court in designating the portions deemed necessary to make a fair record on appeal. This discretion was limited to the indication, within the time specified, of the portions of the transcript required to present the points on the appeal, with the result that the reporter was required to furnish the transcript at the cost of the state by virtue of the court order or in the absence thereof by the mandate of the statute.

When the rule-making power was vested in the Judicial Council by the Constitution in 1927, section 1247 of the Penal Code was continued in force until the exercise of that power. Const. Art. VI, sec. 1a, adopted 1926, Stats.1927, p. 1048.

In 1928, pursuant to the power so vested "Rules of Court" were promulgated. 204 Cal. xxxix. Section 7 of Rule II, Appeals in Criminal Cases, contained provisions which were substantially a copy of former section 1247 of the Penal Code. The rule continued without substantial change, 213 Cal. xxxv, xxxix; 18 Cal.2d 1, 5, until "Rules on Appeal" were adopted by the Judicial Council effective July 1, 1943, 22 Cal.2d 1. Part V thereof deals with "Appeals in Criminal Cases." Because of changes in procedure and practical difficulties in the designation by trial judges of only relevant portions of the testimony, see Article, Witkin, New Rules on Appeal, 17 So.Cal. Law Rev. 232, 275 et seq., the application for a court order to obtain the normal reporter's transcript was omitted. Rule 33(a). Discretionary authority to designate the portions of the reporter's transcript was continued only as to any additional transcript requested. Rule 33(b). Thus the pre-existing requirements regarding an order of court were retained as to the additional portions requested, Rule 33(b) (3), and the necessity for the preparation of the normal reporter's transcript continued without an order. Rule 35(b). As hereinbefore indicated this court subsequently recognized the appealing defendant's right in a criminal case to have the record on appeal furnished at the expense of the State. In re Paiva, supra, 31 Cal.2d 503, at pages 508, 510, 190 P.2d 604.

It is contended by the People that a provision affording a free transcript to an appealing defendant in a criminal case is a matter of substantive law; that the action of the Judicial Council concerned a matter of substance; and that since the power delegated was restricted to the promulgation of rules of practice and procedure not inconsistent with laws then or thereafter in force, Const. Art. VI, sec. 1a(5); see also sec. 1247k, Penal Code added by Stats.1941, p. 1945 and amendments, the Council has exercised an undelegated power.

The answer is that the Judicial Council has not created the defendant's right to a transcript at state expense. The adoption of the rule was merely a recognition of the law as it existed at the time of the exercise of the rule-making power and the rule was consistent with the right.

Let the order issue as prayed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

I concur in the conclusion that, as a matter of right, upon an appeal from a judgment of conviction, the defendant is entitled to a reporter's transcript at the expense of the state. However, I disagree with the classification of In re Paiva, 31 Cal.2d 503, 190 P.2d 604, as "a criminal case".

Ten years after he was convicted, Paiva commenced a proceeding for relief from the judgment by a writ of error coram nobis. The application made by him for a transcript of the evidence offered and received upon the issue of his right to such a writ was made upon the ground that, without it, he could not adequately present his appeal from an adverse order. By long usage, an application for a writ of error coram nobis has been regarded as civil in nature and, in my opinion, there is no sound basis for placing it in the category of a criminal action.

For the reasons which I stated in the Paiva case, 31 Cal.2d 503, at page 511, 190 P.2d 604, I do not consider that decision to be an authority which should control the decision upon the present application for a transcript. Obviously one who is appealing from a judgment of conviction is in an entirely different position from a petitioner who is seeking to set aside a judgment by a proceeding which has been characterized as a "collateral attack" upon it. People v. Superior Court, 4 Cal.2d 136, 47 P.2d 724.

34 Cal.2d 465

AINSWORTH v. BRYANT, Tax Collector et al.

No. S. F. 17880.

Supreme Court of California.

Nov. 23, 1949.

Rehearing Denied Dec. 22, 1949.

Walter Ainsworth, a retail seller of intoxicating liquor, brought action against Edward F. Bryant, Tax Collector of the City and County of San Francisco, and another to enjoin defendants from enforcing against plaintiff an ordinance imposing a tax of 1½ per cent of the purchase price on the purchase of tangible personalty.

The Superior Court of San Francisco County, Thomas M. Foley, J., rendered judgment for the defendants, and the plaintiff appealed.

The Supreme Court, Spence, J., affirmed the judgment, holding that ordinance did not violate constitutional provision that the state, subject to internal revenue laws of United States shall have exclusive right to license and regulate sale of intoxicating liquor.

Prior opinion 203 P.2d 836.

1. Licenses 🔑6(1)
Municipal corporations 🔑956(1)

The power of a city operating under a freeholders' charter to impose taxes for revenue purposes, including license taxes, is strictly a municipal affair pursuant to the direct constitutional grant of the people, and the restrictions on the exercise of that power are only the restrictions appearing in the constitution and charter itself.

2. Municipal corporations 🔑956(1)

When a municipal corporation is created, the power of taxation is vested in it as an essential attribute for all purposes of its existence unless its exercise be in express terms prohibited.

3. Intoxicating liquors 🔑110

As only two of the sections of the Alcoholic Beverage Control Act are classifiable as revenue-producing in imposition of excise taxes, the act is generally regarded as a regulatory measure, consistent with the established distinction between regulation and taxation as governmental functions. Gen.Laws, Act 3796, § 1 et seq.

4. Intoxicating liquors 🔑10(4)

Section of the constitution removing licensing and regulation of liquor business from realm of a municipal affair to that of a general statewide concern, is special in nature and was adopted after earlier section permitting chartered municipalities to reserve to themselves control of all their municipal affairs, subject only to express prohibition or limitation, and therefore the later section must be held to control in express field that it covers, but its effect on plenary power of taxation of a chartered municipality should not be extended beyond express terms of constitutional reservation on subject of intoxicating liquors. Const. art. 11, § 6; art. 20, § 22.

5. Intoxicating liquors 🔑90(1)

Where reservation in constitutional amendment of exclusive power of taxation, was made explicitly to the authority of the State Board of Equalization to collect license fees or occupation taxes on account of the manufacture, importation and sale of intoxicating liquors, the rule of construction "expressio unius est exclusio alterius" was applicable, and no further exclusive power of taxation was intended. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Expressio Unius Est Exclusio Alterius".

6. Taxation ⚷1

Whatever a tax is and by whatever name it is called, the character of the tax must be ascertained by its incidents and from the natural and legal effect of the language employed in the tax statute.

7. Intoxicating liquors ⚷15

Ordinance of San Francisco imposing a tax of 1½ per cent of the purchase price on purchase of tangible personalty of any retailer, and on the use or other consumption of tangible personalty in the city and county, purchased from any retailer for use or other consumption, imposed a "sales tax" and not an "occupation tax" and did not violate constitutional provision that the state, subject to Internal Revenue Laws of the United States, shall have exclusive right to license and regulate sale of intoxicating liquor. Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Occupation Tax" and "Sales Tax".

8. Licenses ⚷30

Immunity from a general taxing measure imposing a sales tax must be clearly established.

◆

Samuel W. Wicklow, San Francisco, for appellant.

John J. O'Toole and Dion R. Holm, City Attorneys, and Thomas J. Blanchard, Deputy City Attorney, San Francisco, for respondents.

SPENCE, Justice.

Plaintiff, a retail seller of intoxicating liquor, brought this action to enjoin defendants from enforcing against him the "Purchase and Use Tax Ordinance" of the city and county of San Francisco. Defendants' demurrer to the complaint was sustained and an injunction was denied. From the judgment accordingly entered, plaintiff appeals.

Duly enacted by the San Francisco Board of Supervisors and approved by the Mayor in July, 1947, with the tax levy effective as of October 1, 1947, the ordinance—No. 4537—is one "imposing [an] excise tax on the retail purchase, use or other consumption of tangible personal property, providing for the registration of retailers, for the levy and collection of such tax and prescribing penalties for the violation of the provisions [thereof]." The sole issue presented is the validity of the application of this ordinance to retailers of intoxicating liquor. It is plaintiff's theory that the tax in question may not be so applied in view of article XX, section 22, of the state Constitution, which provides, in part, as follows: "The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State * * *." Defendants, on the other hand, maintain that the ordinance is a legitimate revenue measure of general application enacted under the taxing power of the municipality, and that the subjection of plaintiff to its terms is not violative of the cited constitutional provision. Consideration of the purport of the local ordinance in the light of the constitutional limitation sustains the propriety of defendants' position.

The ordinance imposes "an excise tax at the rate of one-half of one per cent of the purchase price * * * on the purchase by any person of tangible personal property from any retailer in the City and County of San Francisco, and on the use or other consumption of tangible personal property in said City and County purchased from any retailer for use or other consumption therein." Sec. 15. It specifies that "every person *purchasing* from a retailer in [said] City and County or *using* or otherwise *consuming* [therein] tangible personal property purchased from a retailer for any such purpose is liable for the tax," and that "his liability is not extinguished until the tax has been paid * * *" Emphasis added; sec. 16. It directs the retailer to collect the tax from the purchaser at the time of sale, but if he fails to do so then the "person upon who such tax is imposed shall pay the same when due to the Tax Collector * * *" Sec. 17. It requires every retailer to register with the tax collector and set forth certain data on the registration form, and within five days thereafter the tax collector shall issue without charge to the registrant "a certificate of authority * * * to collect the tax from the purchaser," which certificate "shall be prominently displayed" in the registrant's place of business. Sec. 19. The tax is "due and payable from the purchaser at the time of purchase from a retailer in [said] City and County or, if not so purchased, at the time of using or otherwise consuming tangible personal property in [said] City and County." Sec. 20. The registrant must keep records in the form prescribed by the tax collector and make quarterly returns. Sec. 21. Any violation of the ordinance is made a misdemeanor. Sec. 70.

[1, 2] Having due regard for the foregoing language of the ordinance as expressive of the legislative intent, Sutherland, Statutory Construction, 3rd Ed., Horack, Vol. 2, ch. 45, p. 314, the tax clearly appears to be one imposed upon the purchaser-consumer, applicable to all purchase transactions in all lines of retail business within the city and county, subject to certain exemptions not pertinent here, sec. 18. The funds realized by the tax are declared to be "for capital expenditures and public improvements and for the servicing of [designated sewer and airport] bonds, and any future bond issues of the City and County for capital expenditures or public improvements." Sec. 60. It is well settled that the power of a municipal corporation operating under a freeholders' charter (as is the city and county of San Francisco) to impose taxes "for revenue purposes, including license taxes, is strictly a municipal affair" pursuant to the direct constitutional grant of the people of the state, Const., art. XI, sec. 6; West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 524, 95 P.2d 138, 143, and that "the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and in the charter itself". Id., 14 Cal.2d at page 526, 95 P.2d at page 144. So it was said in the earlier case of Ex parte Braun, 141 Cal. 204, at pages 209-210, 74 P. 780, at page 782, quoting from Mr. Justice Field in United States v. New Orleans, 98 U.S. 381, 25 L.Ed. 225: "A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose. When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditure." Thus, in view of this settled principle, the question arises as to whether there has been reserved exclusively to the state, insofar as concerns intoxicating liquor, Const., art. XX, sec. 22, the power of taxation exemplified by the San Francisco ordinance.

[3] As above quoted, section 22 of article XX of the state Constitution—adopted November 8, 1932, and effective on December 5, 1933, concurrently with the repeal of the Eighteenth Amendment to the federal Constitution, Parente v. State Board of Equalization, 1 Cal.App.2d 238, 240, 36 P.2d 437—reserved to the state the "exclusive right and power to control, license and regulate" the intoxicating liquor business in its designated phases. Sandelin v. Collins, 1 Cal.2d 147, 153, 33 P.2d 1009, 1010; 93 A.L.R. 956. The Alcoholic Beverage Control Act, which was designed to supersede pre-existing statutes relating to the regulation and control of the liquor traffic, State Liquor Control Act, Stats.1933, ch. 658, p. 1697, repealed by Stats.1935, ch. 330, p. 1152, was enacted in

1935, Stats.1935, ch. 330, p. 1123, Gen.Laws, Act 3796, in the "exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people" thereof. Sec. 1. With only two of its sections classifiable as revenue-producing in the imposition of excise taxes, Secs. 23, 24; Empire Vintage Company v. Collins, 40 Cal.App.2d 612, 105 P.2d 391, the act is generally regarded as a regulatory measure, see Yosemite Park & Curry Co. v. Collins, D.C.Cal., 20 F.Supp. 1009, 1015; State v. Glacier Park Co., 118 Mont. 205, 164 P.2d 366, 369, consistent with the established distinction between regulation and taxation as governmental functions. 38 Am.Jur. sec. 322, p. 15; 3 McQuillin, Municipal Corporations, 2nd Ed. rev., sec. 1091, p. 647; 4 Dillon, Municipal Corporations, 5th Ed., sec. 1408, p. 2461.

The purport of the constitutional provision involving the state's exercise of its police power and referring only to its exclusive authority to "license and regulate" the liquor business was considered in the case of Los Angeles Brewing Company v. Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71. There the city had sought to impose upon and collect from plaintiff company a license tax upon its business of manufacturing and distributing beer and wine within the city. In support of the validity of the ordinance it was argued that the word "license" in the constitutional provision meant "*permit to operate* as distinguished from the power to impose a license tax for the purpose of revenue only as the words 'tax' and 'revenue' do not appear in the amendment." 8 Cal.App.2d at page 395, 48 P.2d at page 73. This argument was rejected as contrary to the judicial interpretation given to the phrase "license and regulate" in previous decisions in this state, Ex parte Frank, 52 Cal. 606, 609, 28 Am. Rep. 642; City of San Jose v. San Jose & Santa Clara Railroad Company, 53 Cal. 475, 481; Ex parte Braun, supra, 141 Cal. 204, 206, 74 P. 780; In re Nowak, 184 Cal. 701, 705, 195 P. 402, wherein a grant of such power by the legislature to a municipality had been held to "include authority to impose a license tax for revenue only." Los Angeles Brewing Co. v. Los Angeles, supra, 8 Cal.App.2d page 396, 48 P.2d at page 73. Accordingly, it was deemed proper that the same phrase be similarly construed in the constitutional provision, and therefore the state's "exclusive" licensing power over the liquor business "took away from the political subdivisions of the state the right to impose a *license tax* for the purpose of revenue upon any such business." (Emphasis added; ibid.) To the same effect, see Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 705, 57 P.2d 993.

It is to be noted that the court in the Los Angeles Brewing Company case, supra, was passing on the constitutional provision, art. XX, sec. 22, as originally enacted in 1932 and as it stood in 1933, when it contained no express reference to the power of taxation. However, in 1934 the section was amended and there was added, among other provisions, the following: "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect *license fees* or *occupation taxes* on account thereof * * * The Legislature shall provide for apportioning the amounts collected for *license fees* or *occupation taxes* under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper." (Emphasis added.) Such amendment is pertinent not only for its removal of the need for judicial interpretation as to the state's "exclusive power" of taxation incident to its control of the liquor business but likewise for its precise limitation as to the extent of that power—wholly consistent with the prior decisions recognizing the collection of "license taxes," whether for purposes of revenue-raising or for regulation, as part of the design of the constitutional reservation of authority in the state. Los Angeles Brewing Co. v. Los Angeles, supra, 8 Cal.App.2d 391, 48 P.2d 71.

[4, 5] It is significant that in point of time section 22 of article XX of the state

Constitution was passed much later than section 6 of article XI, a general law permitting chartered municipalities to reserve to themselves control of all their "municipal affairs," subject only to express prohibition or limitation. Being special in nature and adopted later, the constitutional provision removing the licensing and regulation of the liquor business from the realm of a municipal affair to that of a matter of general state-wide concern must be held to control in the express field that it covers, Los Angeles Brewing Co. v. Los Angeles, supra, 8 Cal.App.2d 391, 398, 48 P.2d 71, but its effect upon the plenary power of taxation possessed by a chartered municipality as an essential attribute of its existence, and as such power had theretofore existed, should not be extended beyond the express terms of the constitutional reservation on the subject of "intoxicating liquors." See Hammond v. McDonald, 32 Cal.App.2d 187, 192-194, 89 P.2d 407. The limits of the constitutional provision vesting in the state the "exclusive power" to "license and regulate" in designated particulars was recognized in the case of Three G. Distillery Corporation v. County of Los Angeles, 46 Cal.App.2d 498, 116 P.2d 143, upon rejecting the contention that the "purpose" of the section was "to set up a comprehensive scheme of taxation of intoxicating liquors whereby the state [would] be the sole taxing agency and the municipalities [would] share in the receipts of [that] taxation by receiving from the state a portion of the revenue collected by the state". 46 Cal.App.2d at page 500, 116 P.2d at page 144. After declaring that the "power to license and regulate" did not include the "power to tax," as the distinction between regulation and taxation has been uniformly maintained, the court upheld the county's right to impose a personal property tax based upon "ownership" of intoxicating liquor, and the rule of Los Angeles Brewing Company v. Los Angeles, supra, 8 Cal.App.2d 391, 48 P.2d 71, was expressly noted as concerned solely with the power to make license tax levies but not therefore becoming authority for "exempt[ing] such property * * * from taxation under article XIII, section 1 of the Constitution." 46 Cal.App.2d at page 502, 116 P.2d at page 145. Where the power of taxation has been lodged in the state to the exclusion of municipalities and other entities of that character, it has customarily been done by specific language expressive of such purpose. Thus in 1933—the year intervening between the 1932 adoption of section 22 of article XX of the Constitution and the 1934 amendment thereto—there were two amendments to article XIII, sections 14 and 16, vesting an exclusive power of taxation in the state over "insurance companies" and "banks," respectively, by expressly providing it to be "in lieu of all other taxes and licenses, State, county, and municipal, * * * except taxes upon their real estate". Yet in 1934 when the constitutional provision as to "intoxicating liquors" was amended so as to include an express reservation of an exclusive power of taxation, the reference was made explicitly to the authority of the "State Board of Equalization" to "collect license fees or occupation taxes" on account of "the manufacture, importation and sale of intoxicating liquors", and only amounts so collected were mentioned for apportionment between the state and municipalities. In thus delineating and limiting the specific, exclusive taxing power of the state over such property, it would appear—under the settled rule of construction "expressio unius est exclusio alterius" Sutherland, Statutory Construction, 3rd Ed., Horack, Vol. 2, sec. 4915, p. 412—that no further exclusive power of taxation was intended.

[6] Reverting now to consideration of the terms of the San Francisco ordinance, the question arises as to exactly what kind of a tax is thereby imposed. Whatever it is and by whatever name it may be called, the character of the tax "must be ascertained by its incidents and from the natural and legal effect of the language employed in the [legislative enactment]." Ingels v. Riley, 5 Cal.2d 154, 159, 53 P.2d 939, 942, 103 A.L.R. 1. As appears from the above-quoted portions of the ordinance, the tax is exacted of the consumer upon each transaction of sale, thus affecting the "free-

dom of purchase" within the city. 53 C.J.S., Licenses, § 1, page 448. So classified, it falls under the generic heading of a sales tax, 47 Am.Jur. p. 194, but it rests on a wholly different concept from that underlying an occupation tax imposed upon a merchant for the privilege of doing business and measured by the gross receipts from sales. Illustrative of this latter type is the California Retail Sales Tax Act, Stats. 1933, p. 2599; as amended, which "specifically declares that the tax is imposed *on retail merchants,* and not on the consumers. Section 3 provides in that regard, 'For the privilege of selling tangible personal property *at retail a tax is hereby imposed upon retailers.'* Section 9 of the act further provides that 'The tax levied hereunder *shall be a direct obligation of the retailer.'* " Roth Drug, Inc. v. Johnson, 13 Cal.App.2d 720, 736, 57 P.2d 1022, 1029. In view of such explicit provisions establishing that the "tax [is] on the retailer and not on the consumer", Meyer Const. Co. v. Corbett, D.C.Cal., 7 F.Supp. 616, 618, the cases have consistently so construed the act in recognition of the legislative intent. National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 289, 79 P.2d 380, and cases cited; see, also, Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 162, 78 P.2d 731, 117 A.L.R. 838; De Aryan v. Akers, 12 Cal.2d 781, 783, 87 P.2d 695. While the act authorizes the retailer to collect the tax "from the consumer *in so far as the same can be done*" (sec. 8½), that does not make it a consumer's tax. Rather under the cited section, it is "merely optional with the retail merchant as to whether he will *reimburse himself* from his customers for the tax he is compelled to pay", emphasis added; Roth Drug, Inc., v. Johnson, supra, 13 Cal.App.2d 720, 736, 57 P.2d 1022, 1029, as his direct obligation to the state in order "to be allowed to sell tangible personal property at retail." Meyer Const. Co. v. Corbett, D.C.Cal., supra, 7 F.Supp. 616, 618. The distinction between the two types of sales taxes is emphasized in the following language from the case of Western Lithograph Co. v. State Board of Equalization, supra, 11 Cal.2d 156, at page 163, 78 P.2d 731, at page 735, 117 A.L.R. 838: "The law contemplates the imposing of the fixed rate of the tax on the gross receipts, as defined by the [Retail Sales Tax] act, and *not on the individual sale of merchandise*". (Emphasis added.) And 11 Cal.2d at page 164, 78 P.2d at page 735, it is said: "The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. *It does not become a tax on the sale nor because of the sale,* but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." (Emphasis added.)

But the language of the "Purchase and Use Tax" ordinance here in question expresses a wholly different legislative intent, and the cases interpreting the California Retail Sales Tax Act are therefore not in point. The San Francisco tax is not upon any one's occupation; therefore it is not an occupation tax. Rather the subject of tax under the ordinance is the transaction of sale; the purchaser or consumer is made the taxpayer, and the retailer acts only as the tax collector, responsible for remitting it to the taxing authority. The buyer's occupation is not taxed, for it is not a pursuit or occupation to buy at retail for use or consumption. See Wiseman v. Phillips, 191 Ark. 63, 84 S.W. 2d 91, 96; Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016, 1017. Such type of sales tax as that imposed by the San Francisco ordinance—levied upon the transaction whereby property is acquired and paid by the purchaser—has been analyzed under similar city ordinances as a tax upon the consumer, in contrast with a license tax exacted of a merchant for the privilege of vending his merchandise. Blauner's, Inc., v. City of Philadelphia, 330 Pa. 342, 198 A. 889, 892; Mouledoux v. Maestri, 197 La. 525, 2 So.2d 11, 17-18. Likewise pertinent in noting the differences between the two types of sales taxes is the case of Rainier National Park Company v. Martin, D.C.Wash., 18 F.Supp. 481, where it appears that the state of

Washington has included *both* types in its Revenue Act—in provisions similar, on the one hand, to the wording of the San Francisco "Purchase and Use Tax" ordinance and, on the other, to the language of the California Retail Sales Tax Act. As negativing any duplication in the premise of taxation, their respective purport is noted as follows, 18 F.Supp. at page 486: "As seen above, the retail sales tax is applicable to 'each retail sale in this state'; the business and occupation tax is levied upon persons engaged in the business of making sales at retail within this state * * *."

[7, 8] In the light of these observations, it is manifest that the "purchase and use tax" here in question, though classifiable as a sales tax, does not, when applied to the sale of intoxicating liquors, enter into the field of taxation preempted by the state commensurate with is "exclusive power" to levy "license fees or occupation taxes" thereon. Const., art. XX, sec. 22. Levied upon the freedom or privilege of purchase, it is properly denominated in the ordinance as an "excise tax" as distinguished from a personal property tax. 51 Am.Jur. sec. 292, p. 345; Blauner's, Inc., v. City of Philadelphia, supra, 330 Pa. 342, 198 A. 889, 892; Mouledoux v. Maestri, supra, 197 La. 525, 2 So.2d 11, 20; Rainier National Park Co. v. Martin, supra, D.C. Wash., 18 F.Supp. 481, 486. Adopted purely for revenue purposes, it covers all lines of retail business within the city, and retailers of intoxicating liquors become subject to it, not because they sell that particular commodity but because they sell tangible personal property. Under well-settled legal principles, immunity from such a general taxing measure must be clearly established, 2 Cooley on Taxation, 4th Ed., sec. 672, p. 1403; Ramaley v. City of St. Paul, 226 Minn. 406, 33 N.W.2d 19, 23, and as the "purchase and use tax" here has been analyzed, such exemption does not appear to be the case with respect to the retailer of intoxicating liquors unless he is to be placed in a different category from other retailers because of the regulatory features of the ordinance.

By the San Francisco ordinance the retailer is required to register with the tax collector, procure a certificate of authority to collect the tax, and display it prominently in his store, sec. 19; to keep records, receipts, invoices, and other pertinent papers in such form as required by the collector, sec. 61; and to make quarterly returns, secs. 20, 21; and he is guilty of a misdemeanor in the event of his violating any provision of the ordinance, or failing to render a return or supplemental return, if required by the collector. Sec. 70. Such requirements appear reasonably adapted to insure the collection and proper remission of the tax, and as so premised, they constitute the maintenance of an accounting standard coincident with the city's taxing power rather than a regulation exclusively reserved to the state in the exercise of its police power over the liquor traffic. Const., art. XX, sec. 22. Thus, the constitutional provision vests in the state the "exclusive right and power to * * * regulate" the "sale" and "purchase" of intoxicating liquor, but such reservation of authority contemplates a control exercised in the sense of such regulatory measures as "restrictions as to the class of persons to whom liquors may be sold, and as to the hours of the day and the days of the week during which places of sale may be open." 30 Am.Jur. p. 261. While the San Francisco ordinance embraces regulations affecting the purchase of intoxicating liquor the same as the purchase of any other tangible personal property within the city, it is no more regulatory of the liquor retailer in his business pursuit than are local and non-discriminatory fire ordinances, electrical plumbing and building restrictions, zoning, limitations, and the like—municipal regulations which manifestly do not invade the field of regulation envisaged in the state's control of the liquor traffic. The question here is not whether the ordinance imposing upon the retailer of intoxicating liquor the duty of collecting the "purchase and use tax" is a reasonable regulation of his business, Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S.W. 753, 756; Morrow v. Henneford, supra, 182

Wash. 625, 47 P.2d 1016, 1020, but whether such requirement conflicts in the sense of "regulation" such as the constitutional provision reserves to the state and withdraws from the municipality. That it does not seem wholly clear when it is remembered that the city's power to levy such tax would include the power to use reasonable means to effect its collection, see Rainier National Park v. Martin, supra, D.C.Wash., 18 F. Supp. 481, 488; State v. Glacier Park Co., supra, 118 Mont. 205, 164 P.2d 366, 370, a right which a retailer of intoxicating liquor may not successfully contest upon constitutional grounds because of the nature of the commodity which he sells. A particular matter may be a state affair and exclusively subject to state regulation but yet not immune from local taxation for revenue purposes where the tax does not interfere with the field preempted by the state. In re Galusha, 184 Cal. 697, 699, 195 P. 406; City of San Mateo v. Mullin, 59 Cal.App.2d 652, 654, 139 P.2d 351. The field of taxation is replete with examples of a government entity making businesses generally its agent in tax collections and prescribing certain regulations in the accounting therefor, although such businesses are not subject to "regulations" by the governmental body in any sense comparable to the use of the term, for example, in our state constitutional provision relative to the intoxicating liquor business—such as withholding taxes and social security taxes for the United States Government, unemployment taxes and numerous excise taxes for the state—"a familiar and sanctioned device", General Trading Co. v. State Tax Commission, 322 U.S. 335, 338, 64 S.Ct. 1028, 1030, 88 L.Ed. 1309, "a common and entirely lawful arrangement." Monamotor Oil Co. v. Johnson 292 U.S. 86, 93, 54 S.Ct. 575, 578, 78 L.Ed. 1141. Accordingly, plaintiff as a retailer of intoxicating liquor may not prevail in his complaint of subjection to the terms of the San Francisco ordinance here in question.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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34 Cal.2d 454

NORTHWESTERN PAC. R. CO. v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY et al.

Sac. 6043, 6044.

Supreme Court of California, in Bank.

Nov. 22, 1949.

Rehearing Denied Dec. 22, 1949.

The Northwestern Pacific Railroad Company applied for writs of review and prohibition directed to the Superior Court of the State of California in and for the County of Humboldt and the Honorable Delos A. Mace, Judge of such court, to prevent further proceedings in a condemnation suit instituted by the City of Eureka, a municipal corporation, and to review an order of immediate possession entered therein.

The Supreme Court, Edmonds, J., held that, since condemnation suit involved the removal and relocation of railroad spur tracks, Superior Court had no jurisdiction to proceed until Public Utilities Commission had approved such relocation, and the order of possession was annulled and a writ of prohibition issued.

1. Eminent domain ⚷47(1)

A city having control over municipal affairs under its charter and the right to bring a condemnation action to obtain a crossing of a railroad is only entitled to such relief where the crossing may be constructed without disturbing the public use and enjoyment of the utility. Gen.Laws, Act 6386, §§ 15, 43(b); Const. art. 12, §§ 22, 23.

2. Railroads ⚷97

The establishment of a railroad crossing which will substantially interfere with use of railroad facilities is a matter of statewide concern rather than a "municipal affair" under control of city, and Public Utilities Commission has exclusive jurisdiction to make the primary determination of the necessity and advisability of the change. Gen.Laws, Act 6386, §§ 15, 43(b); Const. art. 12, §§ 22, 23.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Municipal Affair".

3. Eminent domain ⚷169

Where condemnation suit by city to obtain land for extension of a street involved removal and relocation of railroad spur tracks, in absence of showing that Public Utilities Commission had approved such relocation, superior court acted in "excess of jurisdiction" in proceeding with suit and authorizing city to take immediate possession of the property. Gen.Laws, Act 6386, §§ 15, 43(b); Const. art. 12, §§ 22, 23.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Excess of Jurisdiction".

4. Eminent domain ⚿169

Orderly procedure and justice indicate that the approval of Public Utilities Commission should precede exercise of jurisdiction by the court in a condemnation action requiring relocation of railroad tracks. Gen.Laws, Act 6386, §§ 15, 43(b); Const. art. 12, § 22.

5. Eminent domain ⚿169

The fundamental jurisdiction of court in eminent domain proceeding may be exercised in such a manner as to substantially affect the operation of a railroad only after administrative approval of the change in use of railroad's facilities. Gen.Laws, Act 6386, §§ 15, 43(b); Const. art. 12, § 22.

6. Eminent domain ⚿264
Prohibition ⚿10(2)

An order of Superior Court taking from a public utility property being used by it for service of the public without prior approval by Public Utilities Commission is in "excess of jurisdiction" as that term is used in determining the right of a litigant to a writ of prohibition or review. Gen. Laws, Act 6386, §§ 15, 43(b); Const. art. 12, § 22.

7. Certiorari ⚿5(2)
Prohibition ⚿3(5)

The nonappealability of an order does not make the remedy inadequate so as to entitle aggrieved party to a writ of review or prohibition if an appeal from final judgment will protect the rights of the parties.

8. Eminent domain ⚿264
Prohibition ⚿3(5)

Where city, in condemnation suit involving removal and relocation of railroad spur tracks, was authorized by order of court to take immediate possession of property, appeal from final judgment did not afford such speedy and adequate remedy as would preclude issuance of writs of review and prohibition to prevent interference with use of railroad facilities without approval of Public Utilities Commission, particularly since city could take possession of and use property during pendency of appeal. Gen.Laws, Act 6386, §§ 15, 43(b); Code Civ.Proc. § 1254; Const. art. 12, § 22.

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Huber & Goodwin, Eureka, Robert L. Pierce, R. S. Myers and E. J. Foulds, San Francisco, for petitioner.

Everett C. McKeage, San Francisco, as amici curiae on behalf of petitioner.

Frank Thompson, City Attorney, and Arthur W. Hill, Jr., Eureka, for respondents.

EDMONDS, Justice.

Upon the filing of a condemnation suit to obtain land for the proposed extension of a street, the City of Eureka obtained an ex parte order allowing it to "take immediate possession of the real property * * * and * * * immediately remove all obstacles and structures from said land and construct a street thereon. * * *" Following the denial of several motions to rescind or to vacate that order and the overruling of the railroad's demurrer to the complaint, this court granted a writ of review and also issued an alternative writ of prohibition to restrain further proceedings until the question of the jurisdiction of the superior court to entertain the action is determined.

The complaint of the city, after reciting the pertinent resolution of its city council and alleging public interest and necessity, states that "the right of way sought to be condemned herein involves the removal and relocation of certain railroad spur tracks of the defendant corporation. * * *" The railroad company takes the position that the Public Utilities Commission has exclusive, or at least original or primary jurisdiction, to determine whether there shall be an abandonment, removal, or relocation of railroad facilities. Until such an administrative determination has been made, the railroad contends, the superior court does not have jurisdiction to entertain a suit in eminent domain for the accomplishment of that purpose. Although the order, authorizing the taking of immediate possession of the railroad property, is stated in language broad enough to allow the removal of tracks, the city's statement in open court that it would take no such action was noted by the trial court in denying the railroad company's motions. However, the complaint states the ultimate necessity of "removal and relocation" of the spur track, and therefore, if the Public Utilities Commission has exclusive or primary jurisdiction, the superior court had no jurisdiction to issue its order.

Article XII, section 22, of the California Constitution, authorizes the Legislature to confer powers upon the commission relating to public utilities "unlimited by any provision of this Constitution." Section 43(b) of the Public Utilities Act, Gen.Laws, Act 6386, states: "* * * the commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing * * * of a street by a railroad or vice versa * * * and to alter, relocate or abolish by physical closing any such crossing heretofore or hereafter established". General order No. 36-B issued by the commission pursuant to section 15 of the act provides that "no railroad corporation shall abandon or remove any depot, platform, siding, spur or other facility except upon thirty (30) days' notice to the public and to the Commission." It is argued by the petitioner that these enactments give exclusive jurisdiction to the commission to make the primary determination of public necessity and convenience where the question at issue concerns the installation of a crossing over railroad tracks or the relocation of any of its facilities.

The city, which has operated under a freeholder's charter since 1895, relies upon section 23 of Article XII of the Constitution, which declares that "this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any * * * incorporated city or town * * *." It is argued that the extension of a street is a municipal affair within the vested power retained by the city and its charter, which antedates both the quoted provision of the Constitution and the Public Utilities Act. Supporting this contention are several decisions which have sustained, as involving municipal affairs, proceedings to condemn rights of way across existing railroad tracks for the purpose of extending streets. City of Los Angeles v. Central Trust Co., 173 Cal. 323, 327, 159 P. 1169 [involving a crossing]; City of Oakland v. Schenck, 197 Cal. 456, 241 P. 545 [concurrent longitudinal rights of way].

The railroad challenges the contention that the charter powers of the city bring it within the cited cases, inasmuch as it was not until three years after adoption of the Public Utilities Act that the city charter was amended to give general control over "municipal affairs". There is no necessity, however, to determine this point. It may be assumed for the purposes of this decision that the city has vested powers over municipal affairs within the rule of the Central Trust company case. The controlling question here is whether the street extension planned by the City of Eureka transcends municipal authority and is properly a matter of statewide concern.

[1, 2] In the Central Trust company case and in City of Oakland v. Schenck, supra, the condemnation and use of the right of way for street purposes involved no disturbance or alteration of existing railroad facilities. It is clear that "if the change in the street does not interfere with the operation and use of the railroad at the time, the Commission cannot prevent the change, and it may be made without the consent of the Commission. But if it does interfere, either at the time or afterward, whether by natural causes, or lack of repair of the street as changed, or by reason of changes

in the construction or use of the railroad, subsequently directed or approved by the Commission, the city must conform to the orders of the Commission so as to avoid such interference." Civic Center Association v. Railroad Commission, 175 Cal. 441, 454, 166 P. 351, 356. In other words, although the city may have control over municipal affairs under its charter and thereby have the right to bring a condemnation action to obtain a crossing of a railroad, it is only entitled to such relief where the crossing may be constructed without disturbing the public use and enjoyment of the utility. If the proposed crossing, whether lateral or longitudinal, would substantially interfere with the use of the facilities of the utility, then the matter becomes one of statewide concern, rather than a "municipal affair" and the commission has exclusive jurisdiction to make the primary determination of the necessity and advisability of the change.

[3, 4] The complaint in the present case clearly states that removal and relocation of the tracks constitutes an essential part of the relief sought. There is no allegation that approval of the commission has been obtained for such relocation. Orderly procedure and justice indicate that the approval of the Public Utilities Commission should precede exercise of jurisdiction by the court in a condemnation action requiring relocation of tracks. Great Northern Ry. Co. v. Superior Court, 126 Cal.App. 575, 576, 579, 14 P.2d 899.

[5, 6] This requirement does not take from the superior court its fundamental jurisdiction over the subject matter of an eminent domain proceeding. But where such jurisdiction is sought to be exercised in such a manner as to substantially affect the operation of a railroad, it may only be exercised after there has been an administrative approval of the change in use of the railroad's facilities. An order of the superior court taking from a public utility property being used by it for the service of the public, in the absence of any showing of prior approval by the commission, is one which is in excess of jurisdiction as that term is used in determining the right of a litigant to a writ of prohibition or review. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 132 A.L.R. 715.

[7, 8] The facts of this case clearly show that the petitioner has no other plain, speedy and adequate remedy. Although the nonappealability of an order does not make the remedy inadequate, if an appeal from the final judgment will protect the rights of the parties, the City of Eureka is now authorized to take possession of the railroad property. Moreover, section 1254 of the Code of Civil Procedure provides that the plaintiff may take possession and make use of the premises during the pendency of an appeal from the judgment in an eminent domain proceeding. Accordingly, before a final determination on appeal, the street could be established, and the tracks removed. The result of such action necessarily would be the loss of use of freight facilities by the carrier and the public for a considerable period of time. In these circumstances, it cannot be said that the remedy by appeal is either speedy or adequate.

The order or possession is annulled and a writ of prohibition will issue prohibiting the respondent court from further proceedings until approval of the proposed relocation of tracks has been obtained from the Public Utilities Commission.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

34 Cal.2d 459

PEOPLE v. BEHRMANN.

Cr. 5004.

Supreme Court of California, in Bank.

Nov. 22, 1949.

As Modified Dec. 6, 1949.

Paul R. Behrmann was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of grand theft, and he appealed.

The Supreme Court, Schauer, J., dismissed the appeal, and held that an oral notice of appeal was ineffective to perfect the appeal.

Carter, J., dissented.

Prior opinion 205 P.2d 1096.

1. Criminal law ⚷1081

Time for filing of notice of appeal in a criminal case is jurisdictional, and cannot be extended by action of the parties or by order of the court.

2. Criminal law ⚷998

Where judgments of conviction were regularly pronounced and had been entered in the minutes and judgment book, motion for new trial had been denied, time for appeal had expired, and there was no motion or showing of facts to support a motion to vacate judgments on statutory or court-recognized grounds, trial court was without power to set aside judgments of conviction.

3. Criminal law ⚷998

Judgments of conviction may not be set aside to permit reconsideration of an application for probation.

4. Criminal law ⚷1081

Under rule providing that an appeal may be taken by filing a written notice of appeal, reduction to writing in clerk's minutes of defendant's oral notice of appeal given immediately after denial of a new trial would not constitute a substantial compliance with rule. Rules on Appeal, rule 31.

5. Criminal law ⚷1081

Orally given notice of appeal from judgment of conviction of felony and from an order denying defendant's motion for a new trial was ineffective to perfect an appeal. Rules on Appeal, rule 31; Pen. Code, § 1239.

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Morris Lavine, Owen A. Bartlett and Jack B. Tenney, Los Angeles, for appellant.

Fred N. Howser, Attorney General, James A. Doherty and William E. James, Deputy Attorneys General, for respondent.

SCHAUER, Justice.

The principal question in this case is whether an orally given notice of appeal from judgments of conviction of felony and from an order denying defendant's motion for new trial is effective to perfect an appeal. We have concluded that it is not and that, since no written notice of appeal signed by defendant or his attorney* was filed within ten days after making of the order and rendition of the judgments, as required by Rule 31 of the Rules on Appeal, the purported appeal must be dismissed.

Rule 31 (22 Cal.2d 22) provides, "In the cases provided by law, an appeal may be taken by *filing a written notice* of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order * * * *If the appeal is by the defendant the notice shall be signed by him or by his attorney* * * * The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency." (Italics added.)

The superior court found that defendant was guilty of three counts of grand theft. Defendant moved for a new trial. On March 24, 1948, the motion for new trial was argued and denied and the court rendered its judgments of conviction; defendant at once gave oral notice of appeal from the judgments and the order denying a new trial. This notice was entered (of course in writing) in the clerk's minutes. On April 6, 1948 (13 days after rendition of judgment), defendant filed a written and signed notice of appeal from the March 24 judgments and order, and the trial court "ordered that the above Notice of Appeal be entered nunc pro tunc as of April 2, 1948." On April 7, 1948, the trial court, apparently promptly realizing that the April 6 order was inadvertent, ordered that "the purported nunc pro tunc order of April 6" be vacated; it then granted defendant's motion that the March 24 judgments be vacated to permit reconsideration of an application for probation; the application for probation was denied; and the court again rendered judgments of conviction. Thereupon defendant (on April 7, 1948, 14 days after the original judgments were rendered) filed a written and signed notice of appeal from the judgments rendered on April 7 and "from an order [date not specified] denying a new trial."

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* Counsel on appeal have been substituted since the time for giving notice of appeal expired.

[1] The order of April 6, 1948, which purported to require that the written notice of appeal filed on that date be "entered nunc pro tunc as of April 2," even if it had not been vacated, could be of no effect. The time for filing of notice of appeal is jurisdictional and cannot be extended by action of the parties or by order of the court. (People v. Lewis (1933), 219 Cal. 410, 414, 27 P.2d 73; In re Horowitz (1949), 33 Cal.2d 534, 537, 203 P.2d 513.) Therefore, no written notice of appeal from the judgments and order of March 24 was timely filed.

[2, 3] The order of the trial court made April 7, 1948, which purported to vacate the judgments of March 24 was not effective. The judgments were regularly pronounced and had been entered in the minutes and the judgment book, a motion for new trial had been denied, the time for appeal had expired, and there was no motion, or showing of facts to support a motion, to vacate the judgments upon statutory or court-recognized grounds (see In re Pedrini (1949), 33 Cal.2d 876, 879, 206 P.2d 699; In re Sargen (1933), 135 Cal.App. 402, 406, 27 P.2d 407); therefore, the trial court was without power to set them aside (In re Pedrini (1949), supra, p. 878 of 33 Cal.2d, 206 P.2d 699; People v. McAllister (1940), 15 Cal.2d 519, 526, 102 P.2d 1072; People v. Avelino (1947), 81 Cal.App.2d 934, 935, 185 P.2d 361; In re Garrity (1929), 97 Cal.App. 372, 376, 275 P. 480). The order purporting to vacate the judgments was avowedly made to permit reconsideration of an application for probation; the law does not provide for a motion to vacate the judgments on that ground. (See People v. Looney (1935), 9 Cal.App.2d 335, 340, 49 P.2d 889).[1] Since the March 24 judgments and order denying a new trial constituted a complete and final disposition of the cause antedating the purported entry of the April 7 judgments, the latter are of no effect, and there is nothing to which the written notice of appeal filed on April 7 can apply.

[4] Defendant urges that the reduction to writing in the clerk's minutes of his oral notice of appeal given immediately after denial of a new trial and pronouncement of the judgments of March 24 was a substantial compliance with Rule 31. The contention is without merit. When the notice of appeal was reduced to writing in the clerk's minutes it may be said to have *become* written (see Cox v. Tyrone Power Enterprises (1942), 49 Cal.App.2d 383, 394, 121 P.2d 829) but it was not *given* in writing and signed by the defendant or his attorney as required by Rule 31. It was formerly the law (Pen.Code, § 1239, as amended Stats. 1939, p. 2800) that an appeal in a criminal case might be taken by oral notice in open court at the time the judgment was rendered or by written notice filed within five days from the rendi-

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[1] In such a situation the trial court, if it determines that probation should be granted, can suspend execution of the judgment (People v. Sidwell (1945), 27 Cal.2d 121, 127, 129, 162 P.2d 913) unless execution thereof has been commenced (In re Bost (1931), 113 Cal.App. 237, 239, 298 P. 85; In re Bost (1931), 214 Cal. 150, 152, 4 P.2d 534). If the terms of probation are fulfilled the judgment may eventually be vacated and the cause dismissed (Pen.Code, § 1203.4) but in that case the power to vacate the judgment is dependent upon the statutory procedure and it arises only when probation has been granted and fulfilled.

tion of judgment. It is clear that Rule 31 was drafted by the Judicial Council and intended by the Legislature to change these provisions. Rule 31 became effective on July 1, 1943; the Legislature had provided (Pen.Code, § 1247k as amended Stats. 1943, ch. 4, § 2, effective January 14, 1943) that on July 1, 1943, all laws in conflict with the rules should be of no further effect. And section 1239 of the Penal Code now provides that an appeal may be taken in the manner provided in the Rules on Appeal. The rules contain no provision for an appeal by notice given orally and reduced to writing in the clerk's minutes; They contemplate only the one method, by notice given in writing, signed by the defendant or his attorney and filed with the clerk. (See the provisions of Rule 31 that the notice be filed with the clerk and that it be signed; Rules 33(a) (1) and 34 (1), providing that the clerk's transcript contain a copy of the notice, in addition to a copy of the minutes; Rule 35, providing for computation of time for preparation of the record from the time of filing of notice of appeal.)

[5] Defendant relies upon the provision of Rule 31 that the notice "shall be liberally construed in favor of its sufficiency" as supporting his contention that it can be given orally and reduced to writing only in the minutes. This provision does not aid defendant, for the notice to be liberally construed is the one described in the rule; viz., a notice given in a writing signed by the defendant or his attorney and filed with the clerk; and the liberality in construction relates to sufficiency of content, not to character as oral or written. As held in Isenberg v. Superior Court (1940), 39 Cal.App.2d 106, 109, 102 P.2d 552, 553, "The suggestion that when the oral notices of appeal were given at the time judgment was pronounced, and were by the clerk written in the docket * * *, the requirements of the law were satisfied, is answered by the language used in People v. Lewis [supra], [219 Cal. 410, 413, 27 P.2d 73]: 'The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. * * *' The only effective notice of appeal is one given in writing by the defendant or his counsel and filed with the clerk". In accord is People v. Darcy, (1947), 79 Cal.App.2d 683, 693, 180 P.2d 752. The case of Barron v. Deleval (1881), 58 Cal. 95, relied upon by defendant, is neither controlling nor persuasive here.

For the reasons above stated, the purported appeal is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The oral notice of appeal was in compliance with the rules on criminal appeals properly construed, and certainly constituted a substantial compliance with those rules.

The Rules on Appeal for criminal appeals provide that the appeal *"may"* be taken by filing a written notice of appeal (Rule 31). The word "may" is permissive (Rule 40(d).) It follows, therefore, that while a written notice is proper, it is not mandatory, leaving the way open for an oral notice of appeal which has been the practice for many years. This is made more certain when we remember that in civil appeals, the appeal *"is"* taken by filing a written notice, thus excluding other methods (Rule 1(a)), and the "notice of appeal *shall* be filed within 60 days". (Rule 2(a).) "Shall" is mandatory. (Rule 40 (d).) It is apparent, therefore, that when a written notice is mandatory, the rules use words of compulsion, but they chose to use merely permissive language in criminal appeals.

The foregoing becomes even more obvious when we follow the command in the rules that they be *liberally* construed. (Rule 31, specially required for criminal appeals, and Rule 53(a) generally for all appeals.) Surely if the written notice is not mandatory, then in the light of the necessity for a liberal construction a substantial compliance will suffice. It cannot be doubted that an oral notice in open court is substantial compliance. Such notice is of record in the minutes of the court and the prosecuting attorney has full notice thereof.

I have, on other occasions, called attention to the fact that members of this Court pay lip service to the necessity for liberal construction of the statutes and rules by recognizing that such necessity exists, but fail to apply this recognition when the facts demand it. The word "liberal" is defined as that which is not confined or restricted to the literal sense. Webster's International Dict., 2d Ed. An interpretation of the rule relating to criminal appeals (Rule 31) which gives the defendant the right to file a written notice *or* to give oral notice in open court (which becomes a written notice when the clerk reduces it to writing in the minutes) does not engraft on the rule something which has been omitted which the court believes should have been included therein, but is a fair interpretation within the spirit and meaning of the rule and is not inconsistent with the language used. It also resolves all reasonable doubt in favor of the applicability of the rule to the particular facts at hand in view of the previous practice in cases of this type.

I would, therefore, hold the notice of appeal sufficient and dispose of the case on its merits.

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94 Cal.App.2d 697

KING v. KAPLAN.

Civ. 17158.

District Court of Appeal, Second District, Division 2, California.
Nov. 18, 1949.

Rehearing Denied Dec. 5, 1949.

Action by Marie Harriet King against Robert Frank Kaplan for personal injuries sustained in motor vehicle collision as result of willful misconduct of the defendant.

There was a judgment for the defendant in the Superior Court of Los Angeles County, Stanley Mosk, J., and the plaintiff appealed.

The court in separate opinions, by McComb and Wilson, JJ., held that trial court committed reversible error in restricting argument of counsel for plaintiff and that the defendant's counsel was guilty of prejudicial misconduct in the trial of the case, and reversed the judgment.

1. Appeal and error 🔑1060(1)
Trial 🔑121(2)

Evidence that diabetic host had gotten off his schedule and had missed his lunch and was hurrying home to supper when he ran into parked automobile and injured guest; that he was taking insulin and 50 units of protamin zinc daily; that insulin shock was comparable to intoxication; that a patient loses his equilibrium and sometimes blacks out completely; that severe diabetics take both insulin and 50 units of protamin zinc daily and that host was a severe diabetic would have supported a finding that host was a severe diabetic, and holding of trial court that it would not and refusal to permit plaintiff's counsel to argue that the testimony showed that defendant was a diabetic and a severe case, was prejudicial error.

2. Trial 🔑121(2)

Counsel is entitled to argue every material issue in a case upon which evidence has been introduced or when a legitimate inference supporting a particular issue may be drawn from testimony received in evidence.

3. Appeal and error 🔑843(1)

Although the appellate court had concluded that prejudicial error had been committed by the trial court, it was the court's duty to pass upon the other errors assigned so that they might not become the basis of a second appeal in the event of a retrial of the action. Code Civ.Proc. § 53.

4. Appeal and error 🔑839(1)

Independent of the mandate of the code, the obligation rests on the court, in the efficient and proper administration of the law, to determine all questions legitimately submitted by an appeal. Code Civ. Proc. § 53.

5. Appeal and error ⚷1060(1)
Trial ⚷127

In action by guest against automobile host the asking of host by his own attorney whether it wasn't a fact that up to two weeks ago the host had wanted the guest to recover was prejudicial error, although objection was sustained to the question, and the court should have told the jury to disregard the question and any inference or implication flowing therefrom, since the question intimated to the jury that defendant carried insurance, and such error was accentuated by counsel for defendant in argument to jury by an intimation of collusion between the host and the guest.

6. Trial ⚷127

It is improper to get before the jury, directly or indirectly, any fact that conveys the information that the defendant is insured against loss in case a judgment is rendered against him.

7. Trial ⚷127

It is just as improper to inject the question of insurance into the trial for the purpose of defeating an action by intimating that defendant, having nothing to lose because he is insured, is acting collusively with the plaintiff as it is to inject such question in the trial for the purpose of procuring a judgment for plaintiff.

8. Appeal and error ⚷1060(1)
Trial ⚷120(2)

Argument by defendant's counsel that legislature's intention in passing guest statute was to make it practically impossible for any plaintiff to recover in a case like the one before the jury, was prejudicial error as a positive statement without basis in the record.

◆

Jacques Leslie and Simon Taub, Beverly Hills, for appellant.

Jones, Thompson & Kelly, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries received as a result of the alleged wilful misconduct of defendant, plaintiff appeals.

Facts: Plaintiff, a stenographer employed in Beverly Hills, occasionally accepted an invitation to ride home from work with defendant who was employed in the same building. She paid no consideration and was a guest. On November 6, 1947, while plaintiff was riding with defendant in his car he crashed into the rear of a parked automobile as a result of which plaintiff suffered severe personal injuries.

The evidence disclosed that defendant was a diabetic who on that day had not maintained his dietary schedule and was hurrying home to his supper; that a diabetic who took insulin, as defendant did, when not maintaining the proper dietary schedule suffered an effect similar to intoxication whereby the patient loses his equilibrium and sometimes blacks out completely.

Plaintiff's action was predicated upon the theory that defendant knew he was off his schedule; that he knew he was apt to lose his equilibrium and might even black out completely; and that therefore, in undertaking to drive plaintiff home and having an accident, he was guilty of wilful misconduct. At the time plaintiff's cousel was arguing to the jury he said, "The testimony shows that the defendant was a diabetic and a severe case." Upon objection of counsel for defendant, the trial court stated, "Objection sustained. The jury is admonished to disregard that remark by counsel for plaintiff concerning the severity of defendant's diabetes. There has been no testimony as to the severity of defendant's diabetes."

Question: Was it prejudicially erroneous for the trial court to refuse to permit plaintiff's counsel to argue to the jury that defendant was a diabetic and to instruct them that there was no testimony as to the severity of defendant's diabetes?

[1] This question must be answered in the affirmative. There was evidence to support plaintiff's contention that defendant was a diabetic. Police Officer W. L. Ritchey testified that when he arrived at

the scene of the accident he questioned defendant who stated that he was a diabetic who had gotten off schedule and was hurrying home to supper. Later defendant stated to him that he had missed his lunch. There was likewise testimony that defendant was taking insulin and 50 units of protamin zinc each day.

Dr. Helen Martin was qualified as an expert on diabetes and testified that insulin shock could be compared in its effect to intoxication, and that a patient loses his equilibrium and sometimes blacks out completely. She further testified that severe diabetics took both insulin and 50 units of protamin zinc each day, and that in her opinion defendant was a severe diabetic.

Clearly the foregoing evidence would have supported a finding that defendant was a severe diabetic and the trial court's ruling was erroneous. It is obvious that such ruling was prejudicial in view of the fact that the principal issue plaintiff was urging and upon which she was predicating her case was that defendant was guilty of wilful misconduct; that he was a diabetic and, knowing he was such and in view of the fact that he knew he had not eaten and and might become unconscious, was wilfully negligent in permitting her to ride with him in his automobile.

[2] Counsel is entitled to argue every material issue in a case upon which evidence has been introduced or when a legitimate inference supporting a particular issue may be drawn from testimony received in evidence.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

The judgment is reversed.

WILSON, Justice.

[3] I concur in the opinion of Mr. Justice McComb. However, appellant has assigned errors which are not discussed in the opinion and which should be determined in order that the same errors will not become the basis of a second appeal in the event of a retrial of the action. See Canon 19, Canons of Judicial Ethics, 49 Rep.Am. Bar Ass'n, (1924) 760, 767: Canon 16, Canons of Judicial Ethics adopted by Conference of California Judges, 24 Journal of State Bar of Cal. 298, 301. The latter is the first code of ethics to be adopted by a state organization of judges. It is the duty of the court, in case of the reversal of a judgment, to pass upon and determine all questions raised by the appeal. Code Civ. Proc. sec. 53.

[4] Independent of the mandate of the code provision, the obligation rests on the court in the efficient and proper administration of the law to determine all questions legitimately submitted by an appeal. Justice so demands and the litigants are entitled to no less.

Furthermore, our failure to discuss the alleged errors might well generate in the minds of court and counsel the assumption that we approve the court's rulings when we do not.

Two errors have not been passed upon.

[5] 1. While defendant was under examination by his own attorney he was asked this question: "Mr. Kaplan, isn't it a fact that up to two weeks ago, you wanted the plaintiff, Marie Harriet King, to recover in this lawsuit?" Plaintiff's objection to the question was sustained and no reply was made by the witness. Nevertheless, it was error to ask it. While there is grave doubt whether any instruction from the court would have erased the effect of the question from the minds of the jurors, the court, of its own motion and without request from plaintiff, should have told the jury to disregard the question and any inference or implication flowing therefrom.

Obviously defendant would not have lent assistance in having a judgment entered against him had he not been protected by insurance. Nowadays, when some member of practically every family is the owner of an automobile and it is generally known that liability insurance is carried by a large percentage of car owners, any intimation that defendant is insured is error.

[6] It is improper to get before the jury, directly or indirectly, any fact that conveys the information that the defendant is insured against loss in case a judgment

is rendered against him. Pierce v. United Gas & Electric Co., 161 Cal. 176, 188, 118 P. 700; Dameron v. Ansbro, 39 Cal.App. 289, 298, 178 P. 874.

[7] It is just as improper to inject the question of insurance into the trial for the purpose of defeating an action by intimating that the defendant, having nothing to lose because he is insured, is acting collusively with the plaintiff.

We are not referred to anything in the record indicating that defendant was attempting to aid plaintiff in recovering judgment. The mere asking of the question without any foundation for the implication which it bears would immediately create in the minds of the jurors the thought that plaintiff and defendant were in collusion to mulct the insurance company that covered defendant's liability.

The error was accentuated by the following statement made by defendant's attorney in his argument to the jury: "I cannot tell you everything about this case. I am prevented by certain rules, but there is something going on here; perhaps some of you have sensed it, and that needs to be stopped."

This statement reveals counsel's real purpose in asking the question complained of—to cause the jurors to believe that there was collusion between plaintiff and defendant. How would they have "sensed" that "there is something going on here * * * that needs to be stopped" if the thought had not been implanted in their minds by the improper question?

2. During the final argument the following occurred:

"Mr. Kelly: I am going to tell you about the intention of the Legislature in passing the law applicable to this case—

"Mr. Leslie: Objection on the ground of improper argument. No evidence has been presented concerning the legislative background or the legislative intent.

"Court: Objection overruled. Proceed.

"Mr. Kelly: Some years ago, because of the operation of a ring in pressing fictitious personal injury claims, the Legislature found it necessary to provide that in cases like this one where the guest sues the host, that the guest show more than simple negligence on the part of the host before a recovery could be made. At that time, the Legislature established the rule that the guest must prove the defendant host guilty of gross negligence before being allowed a recovery. But even this rule was not strong enough to accomplish the desired result, so the Legislature then made the present law; the law that requires the guest to show willful misconduct on the part of the host, intending to make it practically impossible for any plaintiff to recover in a case like this one."

[8] This argument was improper. The objection should have been sustained when made and defendant's counsel should not have been permitted to pursue the subject. The intention or purpose of the Legislature in adopting the guest statute had no place in the action. If counsel correctly stated the intention of the Legislature, it had no bearing on the decision to be reached by the jury. If the statement was not correct obviously it should not have been made. The attorney did not make the statement as his *belief* that the legislative intention was as he related—it was a positive statement without basis in the record.

Furthermore, counsel's argument was calculated to emphasize the foundationless theory of collusion that he had attempted to instill in the jurors' minds by the question to which reference has already been made.

Plaintiff's attorney having made the objection once, it was not incumbent on him to repeat it.

MOORE, P. J., concurs.

94 Cal.App.2d 733

KLEINCLAUS et al. v. MARIN REALTY CO. et al.

Civ. 13893.

District Court of Appeal, First District, Division 2, California.

Nov. 22, 1949.

Hearing Denied Jan. 19, 1950.

Charles Kleinclaus and others brought action against the Marin Realty Company, a corporation, and others to recover for damages from flooding when water pumped by defendant into area enclosed by dikes, seeped onto plaintiff's air field.

The Superior Court of Marin County, Edward I. Butler, J., rendered judgment for the defendants, and the plaintiffs appealed.

The District Court of Appeal, Dooling, J., reversed the judgment with directions, holding that evidence established that defendants were negligent, that evidence failed to establish that plaintiffs were contributorily negligent, and that plaintiffs were entitled to recover for the reasonable cost involved in mitigating damages.

Prior opinion, see 206 P.2d 396.

1. Waters and water courses 🔑176

Where defendants continued to pump water into area enclosed by dikes, after having knowledge that water was seeping onto adjoining air field, until the air field was entirely flooded by seepage, defendants were negligent so as to render them liable.

2. Waters and water courses 🔑176

Fact that plaintiffs blocked natural drainage ditch on their air field before it was flooded, did not preclude them from recovering damages from defendants for negligently flooding the air field, on ground that plaintiffs were contributorily negligent, since plaintiffs were under no duty to anticipate defendant's negligent invasion of the air field.

3. Negligence 🔑68

A landowner may make any lawful use of his land, and it is not contributory negligence for him to neglect to take precautions to avoid future injury which can occur only as result of the negligence of another.

4. Damages 🔑62(1)

The duty to mitigate damages exists alike in cases of breach of contract and tort, willful as well as negligent.

5. Damages 🔑62(1)

A plaintiff is not bound to incur a relatively large expense in an attempt to mitigate damages caused by defendant.

6. Damages 🔑62(1)

A trial court, in considering question of mitigation of damages, should weigh the cost of mitigation against the total damages incurred.

7. Waters and water courses 🔑178(2)

Plaintiffs whose air field was damaged by the negligent flooding thereof by defendants, and who cleared out a culvert in order to mitigate damages, would be entitled in action against defendants for damages, at the very least to the reasonable cost of clearing out the culvert.

8. Damages 🔑42

The reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated.

Theodore Tamba, San Francisco, for appellants.

Hoge, Pelton & Gunther, San Francisco, Richard A. Boyd, San Francisco, Leo V. Killion, San Francisco, of counsel, for respondents.

DOOLING, Justice.

We granted a rehearing in this case to give further consideration to the question of appellants' contributory negligence. Since respondents in their petition for rehearing did not question the accuracy of the recital of the basic facts in our opinion previously filed nor our conclusion that their negligence was clearly established we copy that portion of our previous opinion, Kleinclaus v. Rich, Cal.App., 206 P.2d 396.

"Plaintiffs appeal from a judgment adverse to them in an action for damages for flooding their land. Plaintiffs were operating a private airfield and defendants, who had a contract with the United States Army Engineers to dredge a portion of a canal, pumped water from the canal onto property adjoining plaintiffs' airfield, from whence it seeped through the earth dikes surrounding such property onto plaintiffs' airfield flooding it completely and causing the damage complained of. The complaint counted upon defendants' negligence and the trial court found that defendants were not guilty of negligence and that plaintiffs were guilty of contributory negligence in blocking a natural drainage ditch across their own property.

[1] "On appeal plaintiffs argue that the rule of absolute liability applies, Nola v. Orlando, 119 Cal.App. 518, 6 P.2d 984, and defendants counter that having proceeded in the trial court on the theory of negligence plaintiffs may not change their theory on appeal to one of absolute liability, Niegel v. Georgetown Divide Water Co., 78 Cal.App.2d 445, 177 P.2d 641. We need not consider these questions since defendants' own testimony establishes their negligence beyond possibility of dispute. We quote from the testimony of defendant Rich:

"'When we started to fill this area, we started here. It takes quite some time to fill that with water. Seepage started, of course, at the first place the water hit. * * In a week or ten days the mud had pretty well stopped most of the seepage but by that time enough had seeped out that water would run quite some time through here. * * *

"'The levee itself was approximately five feet higher than the ground * * * and we ran the water level up to within about a foot to six inches of the top of the levee making it four to four and a half above the ground.

"'Q. Did you stop pumping water in after the area became flooded? A. No, we continued our operations until we finished dredging. * * * Because the ditch was blocked off was not our responsibility. We notified the people that blocked the ditch they had to open it.'

"It thus appears without conflict that with knowledge that water started to seep onto plaintiffs' property from the time defendants started to pump they continued to pump water into the area enclosed by the dikes until plaintiffs' airfield was entirely flooded by the seepage and even afterwards. In view of this admission the finding that defendants were not guilty of negligence is without support in the evidence."

The trial court found "that the negligence of the plaintiffs in blocking a natural drainage ditch across their property was the proximate cause of the plaintiffs' damage." The evidence in this respect showed that a drainage ditch had been carried under the plaintiffs' runway through a wooden and metal culvert, that much of the water seeping onto plaintiffs' property from defendants' pumping operations drained into this ditch and that it developed that there must be an obstruction in the culvert because this water accumulated on the upper side of the culvert and only seeped through slowly to the other side. After a lapse of several weeks plaintiffs brought a clam shell dredge onto the property and tore out the culvert, after which the accumulated water passed through. Plaintiffs testified that the delay in this operation was caused by their inability to procure the necessary equipment earlier.

[2] Upon a re-examination of the question we are satisfied with the correctness of our previous conclusion that plaintiffs were under no duty to anticipate defendants' negligent invasion of their land or to have any drainage facilities on their land to carry off water negligently cast thereon by defendants. In LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 349-350, 34 S.Ct. 415, 417, 58 L.Ed. 631, a case dealing with the negligent setting of a fire on plaintiff's property by an adjoining railroad, the United States supreme court stated the principles involved so clearly as to justify the following extended quotation:

"That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law, and takes from him the assumption, and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and 'live cinders' were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

"The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong, you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction."

The California cases are to the same effect. Yik Hon v. Spring Valley W. W., 65 Cal. 619, 4 P. 666; Steele v. Pacific Coast R. Co., 74 Cal. 323, 329-330, 15 P. 851; Flynn v. San Francisco & S. J. R., 40 Cal. 14, 19, 6 Am.Ry. 695; cf. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 565-566, 200 P. 814. In Yik Hon v. Spring Valley W. W., supra, 65 Cal. at page 620, 4 P. at page 666, the court said: "Nor does the allegation that the water passed through the roof, or through openings in the roof, establish that plaintiffs contributed to the injury. They had the right to use their own premises for any lawful purpose. If they had placed their goods in canvas tents, this would not have relieved defendant of the consequences of its wrongful act. There was no such relation between the omission to provide means by which water would be effectually excluded from their building and the tort complained of as would make plaintiffs in any degree participants in the conduct which caused the damage. As has been said: 'The right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his.' 1 Thomp.Neg. 168. See also Fero v. Buffalo & S. L. R. Co., 22 N. Y. 209, [78 Am.Dec. 178]; and Jefferis v. Philadelphia W. & B. R., 3 Houst., Del., 447."

The following cases and texts announce the same rule: North Bend Lumber Co. v. City of Seattle, 116 Wash. 500, 199 P. 988, 989-990, 19 A.L.R. 415; McCarty v. Boise City Canal Co., 2 Idaho 245, 10 P. 623; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 P. 194; 45 C.J. 945; 56 Am. Jur. 854; 4 Shearman & Redfield on Negligence, Rev.Ed., Zipp, sec. 755, pp. 1731-1734; cases collected in note, 19 A.L.R. 423.

[3] The tenor of the vast majority of the decisions is that a landowner may make any lawful use of his land and that it is not contributory negligence to neglect to take precautions to avoid future injury which

can only occur as the result of another's negligence. As so tersely expressed by the United States supreme court in the passage above quoted from the LeRoy Fibre Co. case [232 U.S. 340, 34 S.Ct. 417]: "The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction."

There is little case law to support the complacent assumption of a right arising from a wrong in the statement of respondent Rich above quoted: "Because the ditch was blocked off was not our responsibility. We notified the people that blocked the ditch they had to open it." This bold assertion of the right to flood another's land and put on him the burden of disposing of the water suggests wilfulness and if the case had been tried on that theory might have justified a finding of deliberate trespass.

Woolworth Co. v. Seattle, 104 Wash. 629, 177 P. 644, relied upon by respondents, involved the violation of an ordinance by the plaintiff, and has twice been expressly distinguished by the supreme court of Washington on that ground. North Bend Lumber Co. v. City of Seattle, supra, 116 Wash. 500, 199 P. 988, 990, 19 A.L.R. 415; Tombari v. City of Spokane, 197 Wash. 207, 84 P.2d 678, 681. Nashville, C. & St. L. Ry. v. Nants, 167 Tenn. 1, 65 S.W.2d 189, is out of harmony with the general rule and the California cases above cited.

We are satisfied to hold that plaintiffs were not obliged to anticipate the negligent flooding of their land by defendants and that their permitting the drainage ditch to become clogged before the flooding started cannot constitute contributory negligence. If they had chosen to fill up the drainage ditch deliberately before the danger from flooding by defendants' negligence occurred they would only have been exercising the rights of an owner to use his land in any lawful fashion. The evidence is clear that the culvert was already clogged when the water first began to accumulate in the ditch.

[4-8] The most that can be said is that when plaintiffs discovered that the culvert was clogged they may have been under a duty to clear it out to mitigate their damages. Their land was then already invaded by the water negligently cast upon it by defendants, but the duty to mitigate damages exists alike in cases of breach of contract and tort, wilful as well as negligent. 8 Cal.Jur., Damages, sec. 43, pp. 782-783. The negligent failure to mitigate damages involves other questions than those involved in contributory negligence and on those the court made no findings. The plaintiff is not bound to incur a relatively large expense in the attempt to mitigate damages. Schultz v. Town of Lakeport, 5 Cal.2d 377, 384-385, 54 P.2d 1110, 55 P.2d 485, and cases there cited. Here the evidence is that it cost $600 to clear the obstruction. The trial court, in considering the question of mitigation of damages, should weigh this cost against the total damages incurred. Also the trial court obviously did not consider the evidence that the delay in getting the clam shell was unavoidable since it found the "blocking" of the ditch to constitute contributory negligence and did not consider the question of delay in clearing it out, nor whether that delay was excusable. At the very least plaintiffs would be entitled to the reasonable cost of clearing out the culvert. The reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated. 4 Rest. Torts, sec. 919; 15 Am.Jur., Damages, sec. 27, p. 423, sec. 147, pp. 554-555; 8 Cal.Jur., Damages, sec. 43, p. 783. It is obvious that one by his wrongful act cannot cast on another the necessity of expending money to prevent or mitigate damages and escape liability for the reasonable cost thereof.

Judgment reversed, with directions to permit the parties to amend their pleadings as they may be advised in view of this opinion.

GOODELL, J., Acting P. J., concurs.

94 Cal.App.2d 823

STING v. BECKHAM et al.

Civ. 3874.

District Court of Appeal, Fourth District, California.

Nov. 28, 1949.

Emily J. Sting brought an action for partition of realty against Mary Beckham and others.

The Superior Court for Riverside County, Wm. D. Dehy, J., rendered a judgment ordering a sale, and the defendant Beckham appealed.

The District Court of Appeal, Griffin, J., affirmed the judgment, and held that the trial court properly determined that partition in kind could not be made without prejudice to one party or the other.

1. Partition 🔑77(1)

Partition in kind is favored by law. Code Civ.Proc. § 752.

2. Partition 🔑77(4)

Whether partition in kind can be made without great prejudice to owners is a question of fact. Code Civ.Proc. § 752.

3. Partition 🔑77(4)

Party asking for sale instead of partition has burden of proving that partition cannot be made without great prejudice to owners. Code Civ.Proc. § 752.

4. Partition 🔑77(3)

Where there was evidence that well greatly exceeded value of remaining land and was indivisibly linked with balance of property both physically and with respect to value and well could not be separated without great detriment, court could properly require sale rather than partition in kind. Code Civ.Proc. § 752.

5. Partition 🔑77(3)

Character and location of property is itself evidence from which a court may infer that partition in kind cannot be made without great prejudice to owners. Code Civ.Proc. § 752.

6. Appeal and error 🔑1009(3)

Where there is sufficient evidence shown, even though conflicting, from which trial court might reasonably conclude that partition in kind would result in great prejudice to owners, determination ordering a sale will not be disturbed on appeal. Code Civ.Proc. § 752.

Geo. D. Blair, Los Angeles, for appellant.

Best, Best, Gabbert & Krieger, Riverside, for respondent.

GRIFFIN, Justice.

This is an action for partition of approximately 60 acres of unimproved land near Banning, jointly owned by plaintiff Emily J. Sting and defendant Mary Beckham. The only improvements on the land are a water well, a pump over which there exists a shed constructed by defendant Beckham and a 4-inch water pipeline running about 1600 feet from the pump, across the real property, to a rock plant on adjacent land separately owned by defendant Beckham.

The court found that the only interest plaintiff had was an undivided one-half interest in the real property and well thereon. The water from the well had been used by defendant at the rock plant for many years and it was necessary to use all the water produced in the operation of the plant.

Plaintiff brought this action for partition and division of the premises and if partition could not be had without material injury, then for a sale thereof and division of the proceeds and for an accounting for the value of the water used by defendant. Plaintiff claimed to be part owner in the pump, pipelines, machinery and equipment used in connection with the well, but this issue was decided against her.

After trial the court found that plaintiff is entitled to have said real property partitioned; that partition thereof cannot be made without prejudice to the owners; and that a referee should be appointed to make the sale of said property, and accordingly ordered the sale.

The narrow question raised on this appeal is whether there is sufficient evidence to support the trial court's conclusion and finding that the property should be sold because partition in kind could not be had without great prejudice to the parties.

[1–3] Counsel for plaintiff concedes defendant's argument, which is supported by such authorities as East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999; Mitchell v. Cline, 84 Cal. 409, 418, 24 P. 164; and sec. 752, Code Civ.Proc., that the general rules of law applicable are (1) that partition in kind is favored by the law; (2) that whether or not partition in kind can be made without great prejudice to the owners is a question of fact; and (3) that the party asking for a sale instead of a partition has the burden of proving that a partition cannot be made without great prejudice to the owners. However, plaintiff maintains that she has met this burden and by virtue of the evidence has established as a fact that partition in kind could not be made under the circumstances of this case without great prejudice to one or the other of the owners.

There was considerable evidence introduced as to the character of the property, and also evidence was produced indicating that the only purpose which the well served was to furnish water to the rock plant; that the land had little value without the well and water therefrom and, although the evidence was conflicting, the court might well have believed that the value of the well so greatly exceeded the value of the remaining land that a partition in kind would have resulted in a great injury to the party denied the possession of the well, and that the well property here was so indivisibly linked with the balance of the property, both physically and with respect to value, that it could not be separated therefrom without great detriment. Had the trial court partitioned the property it is apparent that each party would have wanted the well located on the parcel allotted to her.

[4] The court, from all the evidence and inferences deducible therefrom, properly determined that a partition could not be made without prejudice to one party or the other and accordingly properly ordered that a sale thereof by a referee should be made.

[5, 6] Priddel v. Shankie, 69 Cal.App.2d 319, 159 P.2d 438, is one of the cases which establishes the principle that the character and location of the property is itself evidence from which a court may infer that partition cannot be made without great prejudice to the owners. The question of "great prejudice to the owners" is a factual question to be determined by the trial court and, as here, where there is sufficient evidence shown, even though conflicting, from which the trial court might reasonably draw the conclusion that partition would result in "great prejudice to the owners", and ordered a sale of the property, its determination will not be disturbed on appeal. Bartlett v. Mackey, 130 Cal. 181, 183, 62 P. 482; Mitchell v. Cline, supra; Sauri v. Sauri, 1 Cir., 45 F.2d 90; De Roulet v. Mitchel, 70 Cal.App.2d 120, 160 P.2d 574.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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94 Cal.App.2d 802

ROBINSON v. ROBINSON.

Civ. 3879.

District Court of Appeal, Fourth District, California.

Nov. 25, 1949.

Action by Frances Dudley Robinson against Barnett Robinson for divorce, wherein an interlocutory judgment of divorce was granted plaintiff in which property settled agreement between the parties was approved and the parties were directed to abide by the provisions thereof.

Subsequently, the Superior Court of Orange County, C. C. McDonald, J., modified the decree, and ordered that money placed in escrow for the building of a house be divided $5,046.44 to the plaintiff, and $896.43 to the defendant. On subsequent motion, such court, Franklin G. West, J., vacated modification order, and the plaintiff appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment on the ground that the original modification was made without jurisdiction and was void.

1. Husband and wife ⚷278(1)

Where it was not contended that property settlement between husband and wife was tainted by fraud or compulsion or was a violation of the confidential relationship of the parties, the agreement was valid and binding on the court.

2. Divorce ⚷255

Where property settlement agreement was approved by the court in interlocutory decree of divorce and each of the parties was ordered to abide by all the provisions thereof, the unqualified disposition of the property rights thereby effected was a conclusive adjudication and res judicata with reference to civil rights.

3. Divorce ⚷254

Where there was a property settlement agreement providing as a part thereof for periodical payments to be made to the wife by the husband and the agreement is approved by the court which ordered payments pursuant to the agreement, such order will not be subsequently modified, except by the consent of the parties.

4. Divorce ⚷245(1)

Under appropriate circumstances, an award of alimony in a divorce decree may be modified.

5. Divorce ⚷308

Provisions in property settlement agreement adopted by interlocutory decree of divorce, so far as they relate to provisions or allowances made for the support of minor children, are severable from provisions relating to property rights of the parties.

6. Divorce ⚷254

Where property settlement agreement was adopted in interlocutory divorce decree, the court was without jurisdiction to modify interlocutory decree in respect to the division of property or provisions for the building of a house by the husband as a part of the property settlement agreement.

7. Divorce ⚷254

Where court without authority modified property settlement agreement incorporated in interlocutory divorce decree, the court had power to vacate such modification on motion seasonably made.

8. Divorce ⚷254

Where record disclosed that court had no jurisdiction to modify property settlement agreement incorporated in interlocutory divorce decree, the modification was void and could be attacked at any time.

◆

Harry Ashton, Los Angeles, for appellant.

Marjorie Mize, Santa Ana, for respondent.

MUSSELL, Justice.

Plaintiff and defendant entered into a property settlement on January 10, 1947, the stated purpose of which was to effect a complete and final settlement and adjustment of all property rights and interest of every kind and nature between the parties and to provide for the custody, care, support, maintenance and education of their two minor children, and for the support of plaintiff. Provisions were made for the transfer and conveyance of personal and real property to each party and the husband agreed to pay the sum of $100.00 per month for each of the two children, together with the sum of $100.00 per month to plaintiff for a period of ten years. It was agreed that the provisions of the settlement agreement concerning the division of the property were accepted by each party as a complete settlement of all their property rights and a waiver of any and all claims by one against the other in respect to community or other property, except as set forth in the agreement.

The controversy before us concerns the provisions of paragraph three of the agreement, which is as follows:

"Third: The husband agrees that he will build or cause to be built on that certain real property standing in the names of the parties hereto as joint tenants, situated in the City of Laguna Beach, County of Orange, State of California, described as follows:

"Lot 116 of Tract 585 as per Map thereof recorded in Book 26 at Pages 25 to 27 of Miscellaneous Maps, Records of said Orange County, a house for the use of the wife and said minor children, costing approximately $17,000.00, according to plans agreed upon by the parties hereto, to be financed as follows:

"(1) A loan of $10,000.00 to be evidenced by a promissory note secured by a Deed of Trust covering said real property, to be executed by both parties, said note to be paid in monthly installments of $85.00, principal and interest; and

"(2) The balance of said construction cost, amounting to approximately $7,000.00, to be furnished by the husband; the husband agreeing to pay taxes, sewer bond assessments, insurance, upkeep and repairs on said property; and the wife agreeing to make said monthly payments of $85.00 per month due on account of said promissory note."

On June 16, 1947, an interlocutory judgment of divorce was granted to the plaintiff in which the property settlement agreement was approved and each of the parties thereto ordered to abide by all the provisions thereof. On April 30, 1948, an order to show cause was heard in the Superior Court of Orange County before the Hon. C. C. McDonald, judge assigned to said court. On the hearing, the court found that pursuant to the terms of paragraph three of the agreement, a contractor was employed and construction of the house was commenced; that said construction was not completed by the parties because of the failure of the contractor to meet the conditions of the building contract and because of said contractor's death in September of 1947; that because of the impossibility of completing said house on the terms set out in said agreement, the parties modified said agreement by joining in a subsequent agreement for the sale of the property; that a sale was had and the sum of $5,942.87 was deposited and held in escrow subject to the order of the parties. The court ordered and decreed that the money be divided $5,046.44 to plaintiff and $896.43 to defendant and that upon payment of said sum to plaintiff, defendant be released from all obligation to build a house for plaintiff and that he be released from any and all obligations under said property settlement agreement regarding any of the property belonging to the parties.

The provisions of the property settlement and interlocutory decree relative to the amounts to be paid for the support and maintenance of plaintiff and the minor children were not changed.

On July 9, 1948, the defendant filed a motion in said court to vacate the order and judgment made on the hearing on the order to show cause. The motion was based on the ground that the interlocutory decree determined the property rights of the parties and that the court was without jurisdiction to make any order modifying or vacating said interlocutory decree respecting the property rights of the parties. The motion was heard in the same court before Hon. Franklin G. West, who granted the motion in arrest of and to vacate the judgment. From the order vacating the judgment, plaintiff appeals, contending that the court had no jurisdiction to modify the terms of the property settlement agreement and that the motion to vacate the judgment should not have been granted.

[1–3] It is not here contended that the property settlement agreement was tainted by fraud or compulsion or was a violation of the confidential relationship of the parties. The agreement is, therefore, valid and binding on the court. Adams v. Adams, 29 Cal.2d 621, 624, 177 P.2d 265. Where, as here, the settlement agreement was approved by the court in the interlocutory decree of divorce and each of the parties ordered to abide by all the provisions thereof, the unqualified disposition of the property rights thereby effected was a conclusive adjudication and is res judicata with reference to civil rights. Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697. As was said in Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1, 5, "if there is a property settlement agreement providing as a part thereof for periodical payments to be made to the wife by the husband and the agreement is approved by the court and the payments ordered by the decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties". (Citing cases.)

[4, 5] Under appropriate circumstances, an award of alimony in a divorce decree may be modified. Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15; Wilson v. Superior Court, 31 Cal.2d 458, 464, 189 P.2d 266. However, no attempt was made in the instant action to change the amounts payable to the plaintiff and the two minor children. The order of modification was an attempt by the court to apportion a sum of money held in escrow pursuant to a written agreement of the parties for the sale of the premises and was, therefore, an attempt to adjust property rights rather than to modify alimony provisions or allowances made for the support of the minor children. Such provisions in the agreement are severable from those relating to adjustment of the property rights.

[6] Under the circumstances here presented, we conclude that the court was without jurisdiction to modify the interlocutory decree in respect to the division of property or the provisions of paragraph three of the agreement. In this connection, the court found, at the hearing on the order to show cause, that the property upon which the house was to be built was owned by the parties in joint tenancy; that the parties had modified the property settlement agreement by a written agreement providing for the sale of the property and the deposit in escrow of the proceeds, subject to the order of the parties. In Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677, the interlocutory decree provided that the home of the parties be sold and that a part of the proceeds be paid to plaintiff. Defendant moved to modify this provision of the decree on the ground that he was having difficulty in making a satisfactory sale. It was held that the trial court acted in excess of its jurisdiction in modifying the order, for the reason that the decree had become final in the sense that it was no longer subject to the right of appeal or motion for new trial, or any right to relief by order within the provisions of Section 473 of the Code of Civil Procedure. While the rights of the parties to the money deposited by them in escrow, subject to their order under a written agreement, may be determined in a proper proceeding therefor, it cannot be accomplished by the modification proceedings herein.

Plaintiff contends that the fact that a judgment was rendered modifying the interlocutory decree implies that the court ascertained that it had jurisdiction of the parties and subject matter and that, therefore, the judgment cannot be attacked by a motion to vacate the order. This contention assumes that the court, in modifying the decree, determined that the provisions in paragraph three of the settlement agreement relative to the construction of the house were provisions for additional support for the wife and minor children and, therefore, the court had power to order the modification. However, an examination of the record and the findings of the court clearly show that no finding was made as to whether the provisions of said paragraph three were in the nature of alimony payments or a division of property rights. In fact, the findings clearly indicate that the property settlement agreement was a full, fair and complete adjustment of all property rights of the parties and that the court was attempting to determine title to money which was realized from the sale of joint tenancy real property owned by the parties.

[7, 8] Plaintiff finally contends that the court was without authority to vacate the order of modification upon the ground that the court lacked jurisdiction. The point is without merit. A judgment or order may be aside on the ground of lack of jurisdiction when the motion is based on such ground and is seasonably made. Estate of Seaman, 51 Cal.App. 409, 411, 196 P. 928. Since the record discloses that the court had no jurisdiction to make the order of modification, it is void and can be attacked at any time. Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 41, 53 P.2d 127;

Ivory v. Superior Court, 12 Cal.2d 455, 461, 85 P.2d 894.

The order vacating and setting aside the previous order modifying the terms of the interlocutory decree of divorce is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

94 Cal.App.2d 678

STOWE v. MATSON et al.

Civ. 7707.

District Court of Appeal, Third District, California.

Nov. 17, 1949.

Rehearing Denied Dec. 16, 1949.

Hearing Denied Jan. 12, 1950.

DeWitt C. Stowe sued E. N. Matson and another, as sureties on a bond to release an attachment.

From a judgment of the Superior Court of Amador County, J. T. B. Warne, J., for defendants, plaintiff appealed.

The District Court of Appeal, Thompson, J., affirmed the judgment, holding that the attachment was absolutely void, not merely voidable, and hence that the bond for release of the attachment was void as without consideration.

1. Partnership 🔑327(1)

In suit for dissolution of parties' partnership and accounting, count of complaint, merely alleging that defendant became indebted to plaintiff for merchandise received and money due, alleged nothing to bring count within exception to general rule that a partner may not sue copartner in assumpsit for partnership property until after partnership is dissolved and accounting had.

2. Attachment 🔑12

In suit for dissolution of partnership and accounting, addition to complaint of separate count in assumpsit, without alleging that it is based on claims independent of interests in partnership property, does not change nature of action or authorize issuance of attachment, where pleadings and records disclose that only claims involved are those affecting partnership property.

3. Attachment 🔑4

The legality of attachment must be determined from pleadings, proceedings and entire record in attachment suit to ascertain therefrom grievance for which relief is sought.

4. Attachment 🔑12

In suit for dissolution of parties' partnership and accounting, addition to complaint of count merely alleging that defendant became indebted to plaintiff for merchandise received and money due did not change cause of action to one based on contract, and hence conferred no jurisdiction on court to issue attachment.

5. Attachment 🔑12

A suit for dissolution of partnership and accounting does not authorize issuance of attachment.

6. Partnership 🔑318

A suit for dissolution of partnership and accounting is equitable in nature.

7. Partnership 🔑70

A fiduciary relationship exists between copartners.

8. Partnership 🔑318

A partner's claim against copartner is, strictly speaking, merely equitable, as it can be enforced only through equitable action for accounting.

9. Partnership 🔑108

A partner may not maintain suit in assumpsit or at law against copartner on claims growing out of partnership transactions until after dissolution of partnership and accounting.

10. Attachment 🔑138

An attachment, issued in partner's action against copartner for dissolution of partnership and accounting, was unauthorized and absolutely void ab initio, so that bond given by defendant to release attachment was also void as without consideration. Code Civ.Proc. §§ 554, 555.

11. Attachment 🔑1

Attachment is extraordinary and summary proceeding in rem and a purely statutory remedy which creates special and conditional liens. Code Civ.Proc. § 537.

12. Attachment 🔑1

A right or title in property may be acquired by attachment only in strict compliance with statutes.

13. Attachment 🔑192

An undertaking given to release attachment of property is in lieu of lien created thereby. Code Civ.Proc. § 554.

14. Attachment 🔑1

A court is without jurisdiction to issue attachment not authorized by statute.

15. Attachment 🔑66

An attachment issued without jurisdiction or statutory authority is void ab initio.

16. Attachment 🔑211

When complaint affirmatively shows that action is not founded on contract or that plaintiff is not entitled to attachment, court is without authority to issue such writ.

17. Attachment 🔑7, 12

An attachment may not issue in action founded on tort or in equitable suit between partners for dissolution of partnership and accounting.

18. Attachment 🔑192

Where attachment is void for lack of jurisdiction or statutory authority to issue writ, undertaking given to release attachment is void for lack of consideration. Code Civ.Proc. §§ 554, 555.

19. Attachment 🔑345

Sureties on bond to release absolutely void attachment are not estopped from denying their liability on bond in subsequent suit thereon, though they may be estopped from defending suit on ground of mere irregularities in attachment affidavits or proceedings.

20. Attachment 🔑345

A suit for dissolution of copartnership and accounting being strictly equitable suit, wherein partner cannot sue copartner at law or in assumpsit on obligations growing out of partnership affairs until after partnership is terminated and accounting had, sureties on bond given by defendant to release attachment are not estopped from showing that attachment was totally void for lack of jurisdiction or statutory authority to issue it and hence that bond created no liability against sureties. Code Civ. Proc. §§ 554, 555.

21. Attachment 🔑158

The validity of an attachment may be collaterally attacked.

Mazzera, Snyder & DeMartini, Stockton, for appellant.

Chas. H. Epperson, Stockton, for respondents.

THOMPSON, Justice.

In this suit against the sureties on an undertaking given to release an attachment, under Sections 554, 555, Code of Civil Procedure, the plaintiff has appealed from a judgment in favor of the defendants, which was rendered on the ground that the attachment was absolutely void and that the bond was therefore executed without consideration, and created no liability against the sureties. This appeal was heard upon a written stipulation of facts.

The original action was a suit between copartners for dissolution of the partnership and for an accounting. The chief question to be determined on this appeal is whether the attachment and bond for release thereof were void ab initio, or merely voidable. The pleadings, findings, judgment and entire record disclose the fact that the trial court was without jurisdiction to issue the attachment and that it was therefore unauthorized and absolutely void.

[1] The plaintiff and A. G. Jones were engaged as partners in a manufacturing business in Stockton. Plaintiff brought suit to terminate the copartnership and for an accounting. The complaint was couched in two counts. The second count merely alleges that defendant in that suit, Jones, became indebted to plaintiff for merchandise received and for money due and owing.

Nothing is alleged in that count to bring it within the exception to the general rule that one partner may not maintain an action in assumpsit against his copartner for property belonging to the partnership until after the copartnership is dissolved and an accounting is had. Clearly, the second count refers only to partnership property, and not to any claim independent thereof. The affidavit for attachment merely averred that the defendant, Jones, became indebted to plaintiff, without stating which count was relied upon, "for goods, wares and merchandise belonging to the plaintiff and taken and used * * * and for money due and owing from defendant to plaintiff." A bill of particulars, with relation to the second count, was demanded by the defendant and supplied. It definitely shows that all plaintiff claimed in that action was "An undivided one-half interest in the assets of" the copartnership business. The court adopted findings that "defendant has applied monies, receipts, proceeds and has used the assets of said copartnership business for his own purpose without the permission or consent of plaintiff," and that plaintiff is entitled to receive from the defendant, Jones, $3,879.67, "*which is an amount equal to the value of his interest* in the dissolved co-partnership" business. (Italics added.) Judgment was rendered accordingly. No findings were adopted nor was judgment rendered on the second count.

In the present action against the sureties on the bond, with all pleadings, proceedings and records of the attachment suit before it, the court adopted findings to the effect that "at no time did any attachment issue based upon plaintiff's cause of action for dissolution of said partnership; that it is true that at no time *was any judgment recovered* by plaintiff on plaintiff's second cause of action against A. G. Jones," and that "said bond to release attachment *was wholly without consideration and void.*" It is apparent that if more definite findings had been adopted, they would necessarily have been adverse to the plaintiff. Judgment upon said findings was accordingly rendered that plaintiff take nothing by that action. From that judgment this appeal was perfected.

[2] In a suit for dissolution of partnership and for an accounting, the adding to the complaint of a separate count in assumpsit, without alleging that it is based on claims independent of the interests in the partnership property, where the pleadings and records disclose the fact that the only claims involved are those which affect the partnership property, does not change the nature of the action or authorize the issuance of an attachment. Stone v. Superior Court, 214 Cal. 272, 4 P.2d 777, 77 A.L.R. 743; San Francisco Iron & Metal Company v. Abraham, 211 Cal. 552, 296 P. 82; Powers v. Freeland, 114 Cal.App. 146, 299 P. 736. In the Stone case, supra, the court said, 214 Cal. at page 274, 4 P.2d at page 778: "The fact that the plaintiff's complaint * * * contained two counts, and that the second count therein was in the form of a common count for money had and received, cannot be held to change the situation or to entitle the plaintiff to the issuance of a writ of attachment in said action, since her cause of action is admittedly the same in each count, and is founded upon the facts set forth in detail in the first count of her complaint, from which it clearly appears that her only cause of action is one founded upon the defendants' alleged fraud and deceit."

Quoting with approval from the San Francisco Iron & Metal Co. case, the court further said in the Stone case:

"The case of San Francisco Iron & Metal Co. v. Abraham et al., 211 Cal. 552, 296 P. 82, would seem to be precisely in point as applied to the above situation. The plaintiff's complaint in that action was in two counts. The first count specifically pleaded a cause of action based upon fraud and deceit. The second count pleaded a cause of action for moneys had and received. The defendants applied for and received an order discharging an attachment, which the plaintiff had caused to be issued. The plaintiff appealed from said order, but without avail. This court affirmed said order upon the authority of the case of Hallidie v. Enginger, supra

[175 Cal. 505, 166 P. 1], and upon the foregoing line of authorities, upon which that decision was based.

"The fact that the plaintiff in the Abraham Case did not seek to rescind the contract alleged to have been fraudulently obtained is an immaterial circumstance not affecting the cause of action upon which the plaintiff sought to recover in two counts, but which, as the court aptly pointed out, were but different methods of pleading one transaction."

[3] In the Stone case, the Abraham case and the Powers case, supra, under similar circumstances it was held that the mere pleading of an additional common count will not have the effect of changing the principal cause of action to which the second count apparently applies, nor will it authorize the issuance of an attachment which would otherwise be illegal. The legality of the attachment must be determined from the pleadings, proceedings and entire record in the attachment suit to ascertain therefrom what, in fact, the real grievance is for which relief is sought. As the Supreme Court said in the Abraham case [211 Cal. 552, 296 P. 83]: "The question is not what the plaintiff has pleaded, but *what in truth and in fact is its grievance.*" (Italics added.)

[4] We conclude that the addition of count two in the original action did not change the cause of action from a suit for dissolution of partnership and an accounting to one based on contract, and that the second count did not confer jurisdiction on the court to issue the attachment.

[5] The suit for dissolution of partnership and for an accounting did not authorize the issuance of an attachment. In 4 American Jurisprudence, page 621, section 105, which is supported by reputable authorities, it is said: "An attachment cannot be sued out by one partner against another in a suit involving partnership transactions as to which there has been no settlement and accounting."

[6–10] A suit for dissolution of partnership and for an accounting is equitable in its nature. A fiduciary relationship exists between the copartners. As is said in the text of 20 California Jurisprudence, section 35, at page 718: "The claim of one partner is, strictly speaking, merely equitable, as it can be enforced only through an equitable action for an accounting." Commercial Bank of Los Angeles v. Mitchell, 58 Cal. 42; Hooper v. Barranti, 81 Cal.App.2d 570, 578, 184 P.2d 688; 47 C.J., sec. 250, page 803. The authorities appear to be uniform to the effect that one partner may not maintain a suit in assumpsit or at law, for claims growing out of the partnership transactions until after dissolution of the partnership and an accounting has been had. Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; Cunningham v. deMordaigle, 82 Cal.App.2d 620, 186 P.2d 423; Johnstone v. Morris, 210 Cal. 580, 583, 292 P. 970; Mosher v. Helfend, 7 Cal.App.2d 48, 51, 44 P.2d 1050; 20 Cal.Jur. 759, sec. 70; 47 C.J. 802, sec. 250; 40 Am.Jur. 449, sec. 460. We conclude that the attachment in the action for dissolution of partnership and for an accounting was unauthorized and void ab initio. Since the attachment was void, it follows that the undertaking which was executed in lieu of the lien created thereby was without consideration and also void.

[11–19] An attachment is an extraordinary and summary proceeding in rem. It is purely statutory. It creates special and conditional liens. C.C.P., sec. 537. No right or title in the property may be acquired except in strict compliance with the statutes. Anaheim National Bank v. Kraemer, 120 Cal.App. 63, 7 P.2d 765; 7 C.J.S. Attachment, § 2, page 186. The defendant's undertaking given to release the attachment is in lieu of the lien created thereby. C.C.P., sec. 554. If the attachment is not authorized by statute, the court is without jurisdiction to issue it. An attachment which is issued without jurisdiction or authority of statute is void ab initio. When the complaint affirmatively shows that the action is not founded on contract or that the plaintiff is not entitled to an attachment, the court is without authority to issue the writ. An attachment may not issue in an action founded on tort, or in an equitable suit between partners for dissolution of the partnership and an accounting. Where the attachment is void for lack of jurisdiction or statutory authority, the defendant's undertaking given to release the same is likewise void for lack of consideration. When the attachment is absolutely void the sureties on the bond to release it are not estopped from denying their liability thereon in a subsequent suit on the undertaking. It is true that they may be estopped from defending the suit on the ground of mere irregularities in the affidavits for attachment or in the proceedings. In Kreider v. American Surety Company, 6 Cal.App.2d 307, 43 P.2d 831, 832, an order discharging an attachment on the ground that it was unlawfully issued and therefore void was affirmed on appeal. The court said: "The writ being void, there existed no legal right to the seizure of property thereunder, and the bond given by respondent to stay the execution was without consideration. Appellant was entitled to nothing under the void writ and parted with nothing to which he was entitled when the sheriff released the property."

The case of Taylor v. Exnicious, 197 Cal. 443, 241 P. 397, was a suit against the sureties on a receiver's bond in a bankruptcy proceeding. The Supreme Court held that there was no authority for the appointment of a receiver at the instance of a stockholder in a suit against the corporation, and that the court exceeded its jurisdiction in appointing the receiver. The court said, "If the order appointing the receiver be void, a material consideration for the execution of the bond has failed, and the surety cannot be held upon it." The court further declared that "The bond is squarely predicated upon and is given in compliance with an order which the court had no jurisdiction to make." The judgment relieving the surety of liability on the bond was affirmed.

In Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332, a judgment in a suit in assumpsit rendered by a magistrate in which an attachment was illegally issued, was reversed on appeal. The Supreme Court said:

"It is certain that they (the sureties) were under no legal liability on this bond. It was inoperative; * * *.

"The bond is the antecedent of the attachment, and accompanies in point of time the affidavit which must be made before the writ is issued. It depends for its legal effect upon the writ. If no writ were issued, such a bond would be null and void. It could have no effect except as connected with the attachment. They exist together. * * *

The justice in this case had no authority to issue an attachment, or to take such a bond founded upon it. He was, under our statutes, totally without jurisdiction ratione materiae. A bond exacted by an officer when he has no authority to require it is void."

In San Francisco Iron & Metal Company case, supra, an appeal from an order dissolving an attachment on the ground that the action sounded in tort and that the attachment was unauthorized by law was affirmed. The Supreme Court said: "The foregoing facts show that the plaintiff's grievance is a tort and under our statute it was not entitled to an attachment. Code Civ.Proc., § 537; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1. Moreover, searching the entire record, nothing appears showing any contract under which the defendant became indebted to the plaintiff '* * * upon a contract express or implied, for the direct payment of money.'"

The appellant contends that defendants are estopped in this collateral action from denying liability on the ground that the attachment and bond were void. In support of that contention he relies chiefly on Koehler v. Serr, 216 Cal. 143, 13 P.2d 673, 89 A.L.R. 262, and Passow & Sons v. United States Fidelity & Guaranty Co., 177 Cal. 31, 170 P. 1124. The Koehler case, supra, was a suit against the sureties on an undertaking given for release of an attachment. The defendant contended that the action was founded on alleged tort, and not upon a contract and that the attachment was invalid and the bond for release of the attachment was therefore without consideration and void. Judgment for the plaintiff was affirmed. The court said [216 Cal. 143, 13 P.2d 675]: "* * * If, on collateral attack, the fact that the affidavit is false as to the unsecured status of the debt is no defense, then the falsity of the affidavit as to the true character of the plaintiff's cause of action as disclosed by the proof can be no defense, *where, as here, the allegations of the complaint and the averments of the affidavit are prima facie sufficient.*" (Italics added.)

Evidently, in that case, both the complaint and affidavits for attachment disclosed the fact that an attachment should lawfully issue. That case clearly distinguished between a case in which the attachment was merely avoidable, and one in which it is absolutely void because it is issued contrary to the statute. The court determined that, in a collateral action on the bond, the sureties are estopped from asserting that the attachment was merely *voidable.* On the contrary, it is inferred that the sureties are not so estopped from pleading and proving that the attachment is void ab initio. The first syllabus to that case correctly states that conclusion as follows: "The sureties on a bond given to prevent an attachment cannot merely show that the attachment proceedings were voidable in order to support their contention that they are not liable on the bond, but they must show in a proper proceeding that the attachment proceedings were void and a nullity in their inception."

The opinion further states in that regard: "* * * The defendants may not rest content with the assertion that the attachment proceedings need be shown to be merely voidable in order to support their contention that they are not liable on the bond. The case of Passow & Sons v. United States Fidelity & Guaranty Co., [supra], and cases to like effect, hereinbefore cited, show the lack of any merit in that contention. Therefore, in order to avoid the application of the rule in those cases, the defendants must show in a proper proceeding that the attachment proceedings in the case of Koehler v. Leonards & Company were void and a nullity from their inception. See Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am.St.Rep. 17."

In the Mudge case [78 Cal. 34, 20 P. 149], to which the Supreme Court referred with approval regarding the distinction between a void and a voidable attachment, the latter of which, only, will estop the sureties in a collateral suit from denying their liability, it was determined that "the writ of attachment issued therein was absolutely void, and cannot be invoked to uphold the jurisdiction of the court." In that case the complaint in the attachment suit alleged that the defendant obtained plaintiff's property by means of fraud, which was equitable in its nature, and not based on contract, just as it was in the present case. That case also was a collateral attack upon the attachment in a subsequent suit upon the bond. The court said:

"This may be regarded as a collateral attack, which can only be sustained for causes which render the writ absolutely void, and not merely voidable. Pennoyer v. Neff, 95 U.S. 714 [24 L.Ed. 565].

* * * * * *

"The existence of a contract, express or implied, is an essential basis without which no writ of attachment can properly issue; and, as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void, and cannot be invoked to uphold the jurisdiction of the court."

[20] Applying that principle to the present case, it follows that since this was a suit for dissolution of a copartnership and for an accounting of the partnership business, which is strictly equitable, and in which a partner is not permitted to sue his copartner at law or in assumpsit for obligations growing out of the partnership affairs; until after the partnership has been terminated and the accounting had, the sureties are not estopped from showing that the attachment was totally void for lack of jurisdiction or statutory authority and that the bond therefore created no liability against them. In this case the pleadings, proceedings and entire record conclusively show, as the trial court definitely found, that the attachment and undertaking were "wholly without consideration and void."

[21] Regarding the right to collaterally attack the validity of an attachment, the United States Supreme Court said in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, at page 570, that unless that were permitted,

"Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

Likewise, in Pacific National Bank of Boston v. Mixter, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567, the United States Supreme Court held that the sureties on an attachment bond were entitled to attack the validity of the attachment, upon which the suit on the bond is founded, by showing that it was absolutely void. In that case the court clearly distinguished between a void attachment based upon pleadings and a record which gave the court no jurisdiction or authority to issue the writ, and one in which the attachment was *merely voidable for irregularities.* The court said, 124 U.S. at page 728, 8 S.Ct. at page 721: "It is undoubtedly true that the sureties on a bond of this kind are estopped from setting up, as a defense to an action for a breach of its condition, any irregularities in the form of preceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attachment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. * * *

"In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal and therefore a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment, although not affected by all the contingencies which might have discharged the attachment itself. (Citing authorities.) Such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment itself is illegal, and therefore void, so also must be the bond which takes its place. Objections can be made to an attachment issued on proper legal authority, which cannot be used as a defense to a bond taken under the statute for its dissolution; but if there can be no lawful attachment, there can be no valid bond for its dissolution."

We conclude that the attachment which was issued in this case was absolutely void, and not merely voidable, and that the undertaking which was executed for its release was without consideration and therefore also void.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

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94 Cal.App.2d 849

BENAVIDES et al. v. WHITE.

Civ. 17218.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1949.

Rehearing Denied Dec. 20, 1949.

Hearing Denied Jan. 26, 1950.

Thomas A. Benavides and another sued J. Verner White for cancellation of a trust deed sale, an accounting, and damages for fraud.

From a judgment of the Superior Court of Los Angeles County, William J. Palmer, J., for plaintiffs, defendant appealed.

The District Court of Appeal, Doran, J., affirmed the judgment, holding that the statute of frauds was inapplicable.

Frauds, statute of 🔑63(5)

In action to set aside trust deed sale of plaintiff's judgment debtor's property and recover damages for fraud in foreclosing trust deed notwithstanding defendant's oral agreement to cancel it and forego foreclosure sale in consideration of plaintiff's oral promise to pay debt secured thereby, statute of frauds was inapplicable, in light of trial court's view of evidence, which supported judgment awarding plaintiff damages.

J. M. Clements, Los Angeles, for appellant.

A. E. Coppleman and Mendel H. Lieberman, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

The action is for fraud and, among ten specifications for relief in the prayer of the complaint, seeks to set aside a trust deed sale, an accounting and damages.

It appears from the record that plaintiff had a judgment against one Charles H. Trowler; that said Trowler could not be found but plaintiffs discovered certain property belonging to said debtor; that Trowler had executed a trust deed on said property in favor of defendants and a notice of default had been recorded.

The complaint alleges that, "plaintiffs had notice of said records; and having notice thereof, plaintiffs made offer to defendant to satisfy defendant's said debt in consideration of defendant's canceling his said deed of trust and foregoing foreclosure sale thereunder.

"That in consideration for plaintiffs' oral promise to pay defendant the said debt of $600.00, defendant orally agreed and represented that he would cancel his said deed of trust and would forego foreclosure sale thereunder.

"That plaintiffs believed and relied upon defendant's said statements and representations, and believing therein and relying thereon, and not otherwise, plaintiffs caused execution to be levied against said real property for the satisfaction of said judgment, and incurred costs and expenses in the amount of $63.61 therefor." That thereafter defendant refused to settle upon the terms agreed upon and foreclosed the trust deed thus depriving plaintiff of the property.

The court gave judgment for plaintiff for damages and costs from which defendant appeals.

The evidence is conflicting.

It is contended on appeal that the transaction comes within the statute of frauds; that no fraudulent inducements were proven and that no damages resulted from the alleged oral promise of defendant.

On the contrary, respondent points out, and the record sustains respondents' contention, that "no agreement for the sale of a trust deed is involved".

It would serve no useful purpose to recite all of details; it is sufficient to note that a review of the record reveals sufficient evidence to support the judgment and the statute of frauds, in the light of the trial court's view of the evidence, does not apply.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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94 Cal.App.2d 830

BECKER et al. v. BECKER.

Civ. 17001.

District Court of Appeal, Second District, Division 3, California.

Nov. 29, 1949.

Michael H. Becker was granted an interlocutory divorce from Lola Becker. Custody of the parties' minor child, originally awarded to the wife by interlocutory decree was subsequently awarded to the paternal grandmother, Goldie Becker, by an order entered modifying the interlocutory decree. The final decree confirmed such order.

The Superior Court, Los Angeles County, Paul Nourse, J., entered an order modifying interlocutory judgment of divorce, and the final judgment of divorce, and awarding custody of minor child of the parties to the plaintiff's former wife subject to reasonable visitation by Michael H. Becker, by his guardian ad litem Herman Becker and Goldie Becker, the paternal grandmother, intervenor, appealed.

The District Court of Appeal, Vallee, J., held that the trial court's finding that the mother was a fit and proper person and that it was in the best interests of the child that custody be given to the mother was sufficient to support the order granting custody of the minor child to the mother, and affirmed the order.

1. Divorce ⚷303(3)

In proceeding to modify child custody order, trial court's finding that mother was a fit and proper person and that it was in the best interests of the child that custody of the child be given to the mother, was sufficient to support trial court's order giving custody to mother, and taking possession of the child from paternal grandmother

2. Parent and child ⚷2(1)

Where court finds that mother is a fit and proper person to have custody of the child, as between the paternal grandmother and the mother, court cannot do other than award custody to the mother. Probate Code, §§ 1406, 1410.

3. Divorce ⚷303(3)

Where at time paternal grandmother was given custody of divorced parties' child, mother was 16 years of age, did not have a home in which to keep child, and had to work to support herself, and several years later, mother remarried and her husband was capable of supporting child, and willing and anxious to have child in his home, and mother had another child, trial court's order modifying former order and granting custody of child to mother was not an abuse of discretion. Probate Code, §§ 1406, 1410.

◆

Crawford & Heath, Pasadena, for appellant Michael H. Becker.

Harry M. Bowman, Pasadena, for appellant Goldie Becker.

Joslyn & Hollopeter, Pasadena, for respondent.

VALLÉE, Justice.

Appeal from an order modifying a prior order made in an action for divorce with respect to the custody of a minor child. Michael H. Becker is the father of the child. Goldie Becker is the paternal grandmother. Lola Becker is his mother. The child is under the age of fourteen years.

On January 18, 1945, the father was granted an interlocutory decree of divorce. The decree awarded custody of the child to the mother. On December 19, 1945, an order was made modifying the provision of the interlocutory decree by awarding custody of the minor to the paternal grandmother. On January 24, 1946, a final decree was entered which provided that the provision in the interlocutory decree with respect to custody of the child should be continued in force. On October 22, 1948, the court made an order reading as follows:

"The Court Finds that it is to the best interests of the minor child of the parties hereto to remain in the custody of the paternal grandmother, Goldie Becker; that both plaintiff and defendant are fit and proper persons; as between the two parties to this action, it is to the best interests of the minor child that custody be given to the defendant.

"It Is Ordered that the order herein made on December 19, 1945, and filed on December 24, 1945, modifying the Interlocutory Judgment of Divorce herein re custody of minor child, and said Interlocutory Judgment of Divorce and Final Judgment of Divorce are hereby modified, as follows:

"It Is Further Ordered that the custody of the minor child of the parties hereto be awarded to the defendant, Lola Becker Terhorst, subject to reasonable visitation by the plaintiff." The father and the paternal grandmother appeal from the latter order.

Appellants contend that: (1) the court erred in awarding custody to the mother in face of the express finding that it is to the best interest of the child to remain in the custody of the paternal grandmother, and (2) the court erroneously applied the law to the facts.

[1] The court did find that it is to the best interests of the child to remain in the custody of the paternal grandmother, but it also found that the mother was a fit and proper person and that it is to the best interests of the child that custody be given to the mother. The latter finding is sufficient to support the order. Prior to 1931, Code of Civil Procedure, section 1751 pro-

vided that "The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian." In 1931, section 1751 was repealed and re-enacted as Probate Code, sections 1406 and 1410 except that the first sentence of section 1751 was not re-enacted. The cases which construed the first sentence of section 1751 held that as between a parent and a stranger if the parent was competent and had not abandoned the child or failed to maintain it, and had the ability so to do, the court had no choice, but must award the child to the parent. In re Campbell's Estate, 130 Cal. 380, 62 P. 613; Matter of Forrester, 162 Cal. 493, 123 P. 283; Matter of Allen's Estate, 162 Cal. 625, 124 P. 237; In re Mathews' Estate, 169 Cal. 26, 145 P. 503; In re Mathews' Estate, 174 Cal. 679, 164 P. 8; In re Green, 192 Cal. 714, 221 P. 903. Appellants argue that because the first sentence of Code of Civil Procedure section 1751 was repealed in 1931, the rule stated in the cited cases no longer obtains.

[2] It is sufficient for us to say that since the repeal in 1931, the same rule has been consistently followed. Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229. In the Stever case the court said, 6 Cal.2d at page 170, 56 P.2d at page 1231: "* * * before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child." In the recent case of Heinz v. Heinz, 68 Cal.App.2d 713, at page 714, 157 P.2d 660, at page 661, it was said: "The law is established in California that a court does not have jurisdiction to award the custody of a minor child to a stranger as against a parent who is found to be a fit and proper person to have its custody and who is in a position to take care of the child." The paternal grandmother is a stranger. Robertson v. Robertson, 72 Cal.App.2d 129, 133, 164 P.2d 52. The court having found that the mother is a fit and proper person to have the custody of the child, as between the paternal grandmother and the mother, it could not do other than award the custody to the mother.

[3] Appellants' next point is based on the contention that no showing was made of a change of circumstances between December 19, 1945 and October 22, 1948. Assuming, without deciding, that a showing of a change of circumstances was necessary, we think the change is apparent. At the time the paternal grandmother was given custody the mother was sixteen years of age. She did not have a home in which to keep the child. She could not afford to pay anyone to care for the child for her. It was necessary that she work to support herself. At that time her circumstances were such that she was practically compelled to leave the child with the paternal grandmother. On October 22, 1948, the mother was several years older. She had remarried. Her husband was capable of supporting the child and willing and anxious to have the child in his home. She had a home in which to care for the child. She also had another child. These changes were sufficient. We find no abuse of discretion in the order awarding custody of the child to the mother.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

94 Cal.App.2d 846

VERUTTI v. SMITH et al.

Civ. 14227.

District Court of Appeal, First District, Division 2, California.
Nov. 30, 1949.

Ray D. Smith and Ralph W. Christofferson, copartners doing business as Bay Equipment Company, instituted an action for debt against Paul Matus and attached a grader that was being used by Matus on a construction job, and Anna Verutti filed a third party claim in the action and the plaintiffs thereafter filed their application to determine title to the grader.

The Superior Court of Contra Costa County, Harold Jacoby, J., entered a judgment for the plaintiffs and Anna Verutti appealed, and the appellees moved to dismiss such appeal.

The District Court of Appeal, Nourse, P. J., denied the motion on the ground that the appellees had not been prejudiced by appellant's delay.

1. Appeal and error ⚷799

On appellees' motion to dismiss appeal, where they made no counter showing to the case made by appellant for relief under court rule, the facts stated by appellant must be accepted as true. Rules on Appeal, rule 53(b).

2. Appeal and error ⚷629

The purpose of rule providing for relief by appellant was to permit a reviewing court to hear an appeal on its merit when the delays have been inconsequential. Rules on Appeal, rule 53(b).

3. Appeal and error ⚷629

Where transcripts were filed within a reasonable time and appellant's brief was filed before the motion to dismiss was noticed the court must assume that appellant's delays in the preparation and filing of the transcript had not caused appellees any appreciable harm and would deny motion to dismiss appeal. Rules on Appeal, rule 53 (b).

Francis H. Frisch, Napa, for appellant.

Bruce Walkup, San Francisco, for respondents.

NOURSE, Presiding Justice.

In an action for debt against Paul Matus the plaintiffs attached an Adams Patrol Grader which was being used by Matus on a construction job in Napa County. Anna Verutti filed a third party claim in the action which was commenced in Contra Costa County and thereafter the copartners, plaintiffs in the original action, filed their application to determine title to the grader. In due course this proceeding was tried and judgment was entered in favor of the copartners; Anna Verutti appealed and is charged with some delays in perfecting that appeal. These have led to the present motion of respondents to dismiss the appeal.

During the argument on the motion appellant conceded some of the delays charged by respondents and asked and was granted leave to move for relief under Rule 53(b), Rules on Appeal.

On this motion it was shown that the delay in the preparation of the clerk's and reporter's transcripts was caused mainly by the fact that two reporters participated in the proceeding; that one had gone East and was unavailable; that when appellant was given notice of the approximate cost of transcripts she paid the same; that when both transcripts were filed with the county clerk notice was duly given counsel for respondents; and that, no objection having been made, the transcripts were filed with the clerk of this court on June 23, 1949. Appellant's opening brief was filed in this court on July 28, 1949.

[1] Respondents, on August 19, 1949, filed their notice of motion to dismiss the appeal. They have made no counter showing to the case made by appellant for relief under Rule 53(b). We may therefore assume that the facts stated by appellant are true.

[2, 3] The purpose of this rule is to permit a reviewing court to hear an appeal on its merits when the delays have been in-

consequential. Here the transcripts were filed within a reasonable time—that is to say within the time which is ordinarily taken—and appellant's brief was filed before the motion to dismiss was noticed. If an early decision had been desired by respondents they could have filed their brief within the time allowed; their motion to dismiss the appeal is the sole cause for present delays. We must assume therefore that appellant's delays in the preparation and filing of the transcripts have not caused respondents any appreciable harm since they have done nothing to facilitate an early decision on the appeal.

The motion to dismiss the appeal is denied. The motion for relief is granted.

GOODELL and DOOLING, JJ., concur.

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94 Cal.App.2d 848

MILLER v. CORTESE et al.

Civ. 17156.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1949.

Action by John E. Miller against Ross W. Cortese, M. H. Bershin, and Mike E. Dinow (sued as Doe One) wherein defendant, Mike E. Dinow, filed a motion to set aside default judgment entered against him.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., granted defendant's motion and plaintiff appealed.

The District Court of Appeal, Doran, J., affirmed the order holding that defendant's reliance upon statement by attorney retained to represent all defendants jointly that he had filed answer was sufficient justification for defendant's failure to file answer.

1. Judgment 🔑143(7)

Where defendant was informed by other joint defendants that an attorney had been retained to represent all of them jointly and defendant relied on statement by attorney that necessary answer had been filed and that defendant would be kept fully informed, and through misunderstanding answer was filed for other joint defendants only, default judgment against defendant would be set aside on ground that defendant's default was due to mistake, inadvertence, surprise or neglect.

2. Judgment 🔑135

A trial on the merits is favored and courts accordingly will set aside default judgments where party justifiably fails to enter appearance.

◆

Jerrell Babb, Los Angeles, for appellant.

T. B. Knight, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order setting aside a default.

Defendant was served with the complaint on August 31, 1948; default was entered September 16, 1948. Notice of motion to set aside the default was served November 10, 1948. Hearing on the motion was set for November 22nd, continued to December 2nd, on which last mentioned date it was granted.

It is contended on appeal that: "1. Respondent's failure to file answer to appellant's complaint within time permitted by law was not mistake, inadvertence, surprise or excusable neglect. 2. Respondent's affidavit of merit is insufficient. 3. Granting of the motion to vacate entry of default and default judgment was an abuse of the Court's discretion."

The record reveals, as pointed out by respondent, that,

"On September 1, 1948, the respondent called at the home of M. H. Bershin, and discovered that Bershin and Cortese had previously been served with identical pleadings. This respondent was informed by Bershin that an attorney, Louis Warren, had been retained to represent the three of them, to wit, Cortese, Bershin, and the respondent, Dinow. Bershin further stated that the necessary Answer had been filed; that the matter was now at a standstill until such time as it could be brought to trial; that this respondent would be kept fully informed in the matter.

"Through some misunderstanding, counsel, Louis Warren, had filed an Answer on behalf of Cortese and Bershin only. As a result, a default was entered against the respondent on September 17, 1948 and default judgment on October 8, 1948."

[1, 2] There appears to have been no abuse of discretion on the part of the court and the affidavit in support of the motion are sufficient. It is well settled that a trial on the merits is favored.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

94 Cal.App.2d 863

PEOPLE v. McSPADDEN et al.

Cr. 4367.

District Court of Appeal, Second District, Division 3, California.

Nov. 30, 1949.

Ophelia McSpadden and Edward McSpadden were convicted in the Superior Court of Los Angeles County, W. Turney Fox, J., of arson and of burning insured property with intent to defraud an insurer, and they appealed.

The District Court of Appeal, Wood, J., affirmed the judgment on ground that evidence sustained conviction of both defendants.

Arson 🔑37(1)

Evidence sustained conviction of both husband and wife, who were living apart under interlocutory divorce decree, of arson and burning insured property with intent to defraud insurer.

Philip S. Schutz and Alexander L. Oster, Los Angeles, for appellants.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

WOOD, Justice.

Defendants were charged in count I of an information with arson, in that, they unlawfully set fire to a dwelling house at 1401¼ East 15th Street in Los Angeles; and they were charged in count II thereof with unlawfully burning insured property, namely, furniture in said house. Trial by jury was waived. Defendants were convicted on both counts, and they appeal from the judgments and from the orders denying their motions for a new trial. They assert that the evidence was insufficient to support the judgments.

The house involved here is a small wooden building (a part of a bungalow court) consisting of a front room, a middle room (dining room), kitchen and bath room. On October 13, 1948, about 11:45 p. m., a fire chief and some other firemen arrived at said house in response to a fire call which was received at 11:43 p. m. The chief testified that he observed a fire in the front room which was burning a built-in desk in the southwest corner of the room and was burning a bed which was near the desk. He also observed a fire in the middle room which was burning a built-in chest of drawers on the north side of the room and was burning the back of a davenport which was about one foot from the chest. The fires were about 15 feet apart and were entirely inside the house. He examined the electrical wiring in the rooms but he did not find anything unusual about it. The davenport, the bed, and some clothing, which had been partially burned, were carried outside the house. The fires were soon extinguished. No one was in the house when the firemen arrived, and neither defendant was on the premises at the time of the fire.

Another fireman, Mr. Crosby, who is attached to the arson bureau, arrived at the house about 12:15 a. m. on October 14th (about 30 minutes after the other firemen arrived). He testified that he observed, in the front room, a heavy chair in the southwest corner of the room, and also a chiffonier, and some clothing on it (which had not been burned). Outside the house, he saw a davenport, a bed, and some clothing, that had been partially burned. He testified further that the two fires were about 15 feet apart; there was no connection between them; there was no electrical wiring in the fire area which might have caused the fire; in his opinion the fire was not of accidental nature, but the fires were caused by human hands and were set at the same time. After he had been there about 15 minutes he went to a house next door and saw the defendant Ophelia talking on the telephone and he heard her say that she had suffered a fire, she would not be able to work, and she had lost all her clothing in the fire. In a conversation with her, after she had finished telephoning, she said she lived in the house where the fire occurred, she had divorced her husband in January, 1948, and the court had awarded the furniture to her and ordered her husband to pay the mortgage which was on the furniture. She also said she had no idea where her husband was, that she had not seen him "for quite some time," that it was impossible to find him, that he had failed to keep up the payments on the furniture and she had decided to permit the finance company to take the furniture back but a representative of the company told her that the company would not take it back but would garnishee her wages to obtain payment of the note. She said further that she worked in Beverly Hills doing house work and that she returned home at night; that on the night of the fire she arrived in downtown Los Angeles about 9:30 p. m.; then she visited a girl friend on Central Avenue for a few minutes; then she went to a restaurant at 18th and Central; and then returned to her room at the Colonial Hotel (which is two doors from the house where the fire occurred) and went to bed about 10:30 p. m. She said she rented the room in that hotel at 8 a. m. on the day of the fire and she had "only got to take" three or four skirts and a blouse to the hotel room; she rented the hotel room because she had been served with an eviction notice and because her husband had told her by telephone the night before the fire that he was going to sell the furniture; she had been paying $18 a month as rent for the house and her rent for the house was paid until October 22nd; and she was paying $11 a week for the hotel room. She said that when the finance company would not take the furniture back she had the monthly payments on the furniture reduced and at that time the company wrote a $1200 insurance policy covering the furniture. Mr. Crosby testified further that he then went to her hotel room and saw three or four skirts, a jacket and a blouse there; that when he started to examine the bureau she said there was nothing in it; that he found a waffle iron therein, and she said she brought it there because it was a present and she always kept it with her; that the bed was made and it did not appear as if anyone had been lying on it. In a conversation with her the next day at his office, Mr. Crosby told her that from the appearance of her bed soon after the fire he did not think that she was in bed at the time of the fire. She replied that she always slept on one side of the bed and never ruffled the other side and never used a pillow, and when she got out of bed she always laid the covers back and put the pillows in proper place. When he asked her if she thought that was the normal thing to do if she were awakened by a fire she did not say anything. Mr. Crosby and another fireman examined the hotel room on the day after the fire and found therein a clock, several pictures, and a pillowcase filled with clothing and linen. In a further conversation with her the day after the fire, Mr. Crosby asked her if the blankets and bedspread on the bed and the two folded bedspreads in the hotel room and the clock, pictures, and clothing therein were hers, and she replied that they belonged to her. He told her that he had talked with her husband and had learned that several of her statements were not true, and he (Mr. Crosby) asked her to tell the truth. She then said she had lived (in the house where the fire occurred) with her husband (defendant Edward McSpadden) from May until the first week in October, 1948, that on the night of the fire she met him at 8th and Central about 10 p. m., then they went to a cafe and drank coffee, then he accompanied her to her hotel room, that he left there about 10 minutes later and she went to bed. In response to a question regarding the keys to the house where the fire occurred she said she had the only key but the door could be opened by reaching through a broken window pane next to the door. He then showed her a window screen which he had taken from that window, and she then said she had taken that screen from another window and placed it over the window next to the door in order to cover up a hole in the pane. He asked her why she registered at the hotel under the name of Smith, and she said she had registered that way so that her husband would not be able to find her. She also said that on the night of the fire she wanted to tell Mr. Crosby that she had been with her husband that night, but she was afraid to tell him because he might think she was implicated in the fire; that as soon as she saw the house afire she felt "it had been set" and that is why she "lied."

Mr. Wiesinger, an investigator for the arson bureau, testified that about noon on October 14th (the day after the fire), while he was at the place of the fire, the defendant Edward McSpadden came there and stated as follows: He had lived there. The furniture was owned by him and his wife. They had separated and he had moved out on October 3rd and had gone to the Woods Hotel and had not seen his wife since then. He did not know whether she was still living there. He believed that she had insurance on the furniture. On the day of the fire he called his wife in Beverly Hills and told her that he was going to sell the furniture and he was going to the house to clean the furniture. He went to the house at 11 a. m. and finished cleaning the furniture about 3 p. m., and then he locked the door and went away. He did not have a key to the house, but his wife left the door open for him. On the night of the fire he went to work at 10 o'clock in the produce market at 8th and Central, and he had not been near the house after he had finished cleaning the furniture in the afternoon.

Mr. Wiesinger also testified that about an hour after said first conversation the defendant Edward said that his wife had met him downtown about 8:30 p. m. on the night of the fire and they had coffee in a restaurant and then he walked with her to her hotel room.

The manager of the Colonial Hotel testified that she rented a room in the hotel to defendant Ophelia on October 13, 1948, between 7 a. m. and 8 a. m. and that she registered under the name of Ophelia Smith.

In February, 1948, Ophelia was granted an interlocutory decree of divorce from Edward, and the court awarded the furniture to her and ordered him to make the monthly payments of $33.75 which were payable under a mortgage on the furniture. Thereafter the defendants lived together at the house involved here from May to October 3, 1948. On said last mentioned date Edward went to live at the Woods Hotel where he registered under the name of Edward Cane. He testified that he registered under that name so that Ophelia could not find him. Ophelia lived at said house from 1940 until October 13, 1948, when she moved to the Colonial Hotel. She testified that she registered there under the name of Ophelia Smith so that Edward could not find her.

On May 18, 1948, Ophelia made a new mortgage covering the furniture at said 1401¼ East 15th Street, which mortgage provided for monthly payments of $27.70. The mortgagee was a finance company. Ophelia was the borrower and she signed the renewal application and the mortgage. At the time of making the new mortgage, she obtained, upon request of the finance company and through it as agent, the fire insurance policy involved here. The policy, which was issued in May, 1948, by the American Home Fire Assurance Company, stated that said company insured "Ophelia McSpadden and/or Edward McSpadden," to the amount of $1,250, against damage by fire to the household furniture and personal belongings located at 1401¼ East 15th Street, Los Angeles, for the period of time from May 15, 1948, to May 15, 1951. The policy was in effect on October 13, 1948. At the time of the fire about $200 was unpaid on the mortgage.

Defendant Edward McSpadden testified that he went to the house on October 13, 1948, about 11 a. m., and proceeded to clean the furniture and to put things in order preparatory to a sale of the furniture. The furniture had been awarded to Ophelia in the divorce case, but he had her permission to offer it for sale. He was going to sell the furniture and then pay to the finance company the unpaid balance of $200. The remainder of the proceeds, if any, he was going to give to his wife. He left the house about 3 p. m. on the day of the fire. That night, about 8 o'clock, Ophelia came to 8th and Central where he was working as a swamper (loading and unloading trucks), and they had lunch together and then they walked to her room at the Colonial Hotel. He worked at 8th and Central from 10 o'clock to 4 o'clock the night of the fire. His wife informed him that the house had burned, and he went to the house on October 14th about 10 a. m. to see about the furniture he had arranged for sale. While he was there he was arrested. He denied that he told investigator Wiesinger that he had not seen Ophelia after he moved from the house, and he denied that he told him anything concerning insurance on the furniture. He testified that he told the investigator that he saw her the day of the fire. He also testified that he did not light a fire in the house on the day of the fire or at any time with the intention of burning any part of the house or furniture. On cross-examination he testified that on the night of the fire he was in her hotel room about 5 minutes. He did not know about the insurance policy and did not know the furniture was insured. When he was arranging the furniture for sale, the day of the fire, the combination radio-phonograph, the refrigerator, the chrome table and four chairs (which were in the house at the time he moved away on October 3rd) were not there. All the furniture that was covered by the mortgage was in the house at the time he arranged the furniture for sale. He did not owe his wife any money for support under the court order, but he was required under the order to pay the loan on the furniture. He did not have an offer to buy the furniture, but a man was going to look at it.

Defendant Ophelia McSpadden testified that she moved from the house to the Colonial Hotel about 7 a. m. on October 13th, and that she moved because she had received two eviction notices. She took with her a bag of linen, a waffle iron, a floor lamp, a bedspread, a blanket and some clothes. The lamp was included in the mortgage. The refrigerator was not mortgaged, and her sister was keeping it for her. On October 13th, about 8 a. m., she arrived at 208 North Mateo Street, Los Angeles, where she was employed as a housekeeper. She did not return, during that day, to the house where the fire occurred. She finished her work that day about 7:45 p. m., then she visited a girl friend about 15 minutes. She met her husband about 9 p. m. and went with him to a cafe, and then they walked to her hotel room. He stayed there about 5 minutes. She did not leave the hotel that night until she heard the fire engines. When she heard them she jumped out of bed, put on a robe and went to the fire. A fire occurred at the same house in the preceding year, and at that time there was a fire at the front door and a fire at the back steps, and she suspected that one Catherine Cox, who had threatened to "get even" with her, had started those fires. She (Ophelia) locked the house when she moved from it, but "practically everybody around" knew that the door to the house could be unlocked by reaching through the broken window pane next to the door. She was earning only $90 a month and she could not continue the payments on the furniture, and she talked with her husband about selling the furniture and then paying the furniture bill. He said he would go to the house and take care of the sale for her because he knew more about getting a buyer. She testified that she did not set fire to the house or the furniture.

The evidence shows that the fires were of incendiary origin. Defendant Ophelia made many untruthful statements in reply to material inquiries by the investigators. Soon after the fire she told them she had not seen her husband for quite some time and it was impossible to find him; but later she told them, and she also testified, that she had been with him on the night of the fire, and that he could be found at the produce market at 8th and Central Avenue. She told them that she worked in Beverly Hills, and she testified that she worked in Los Angeles (at a place not far from her home). She told them there was nothing in the bureau in her hotel room, when in fact her waffle iron was in it. Her statement to the effect that she was in bed when the fire engines arrived was refuted by the unused appearance of the bed when it was observed by the investi- that she had put a screen over the hole. Her statement that the front door of the house could be opened by reaching through a hole in the window pane was refuted by the fact that she put a screen over the hole. Her consciousness of guilt was indicated by her statements that she was afraid to tell, on the night of the fire, that she had been with her husband because the investigators might have thought she was implicated in the fire; and that she "lied" to the investigators because she felt that the fire had been set. Preparation for the fire was indicated by the facts that she moved from the house shortly before the fire occurred; that she took with her most of her clothing, some bedspreads, blankets, pictures, and other personal belongings; that she removed the refrigerator, radio-phonograph, and chrome table and chairs from the house; and that all the mortgage furniture (except a lamp) was left in the house.

There was conflicting testimony regarding the statements which defendant Edward made to investigator Wiesinger the day after the fire. According to testimony of the investigator, the defendant Edward told him that he had not seen his wife since he moved from the house on October 3rd; that he believed she had insurance on the furniture; and that he had not been near the house after he had finished cleaning the furniture in the afternoon of October 13th. Defendant Edward denied that he made those statements. It was for the trial court to determine what facts were established by the evidence. Apparently the trial court found that Edward made the statements which the investigator testified that he made. It appears therefore that Edward made a false statement to the investigator to the effect that he had not seen his wife for about ten days, when in fact he had been with her on the night of the fire; and that he also made a false statement to the effect that he had not been near the house after he finished cleaning the furniture in the afternoon, when in fact he had been at his wife's hotel room (two doors from that house) on the night of the fire.

Appellant Edward argues that there was no evidence that he knew the furniture was insured. The trial court could have inferred reasonably that he had such knowledge. There was evidence that he told the investigator on the morning after the fire that he believed there was insurance on the furniture. He was named in the policy as one of the insured. He was obligated to pay for the furniture. He made false statements regarding material facts.

The trial court could have inferred reasonably from the actions, conduct and false statements of the defendants that the defendants committed the offenses charged. See People v. Becker, 94 Cal.App.2d 434, 210 P.2d 871. The evidence was sufficient to support the judgments and orders.

The judgments and the orders denying the motions for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

94 Cal.App.2d 851

In re REYNOLDS' ESTATE.

KENNEDY et al. v. BEUSTAD.

Civ. 17049.

District Court of Appeal, Second District, Division 2, California.

Nov. 30, 1949.

Proceeding in the matter of the estate of Thomas J. Reynolds, deceased. T. Edward Kennedy and others filed a petition against Mary Virgie Beustad to revoke after probate the purported last will of deceased.

A judgment was entered by the Superior Court of Los Angeles County, Harold W. Schweitzer, J., dismissing the petition, and confirming the order admitting purported lost will to probate, and the petitioners appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment and order on the grounds that evidence was sufficient to overcome presumption that testator had destroyed missing will with intention of revoking it and to support finding that missing will was in existence at time of testator's death and that sole beneficiary in the missing will was not disqualified as a witness under statute to testify as to provisions therein.

1. Wills ⚿130

Fact that neither witness could recall exact day of month appearing in the date did not render purported lost will invalid as a holographic will, where witnesses testified that will was dated and signed by testator. Probate Code, § 53.

2. Wills ⚿290

Evidence was sufficient to overcome presumption that testator had destroyed lost holographic will bequeathing all of his property to his housekeeper with intention of revoking it and to support finding that will was in existence at time of testator's death, so as to authorize its probate as a lost will. Probate Code, § 350.

3. Wills ⚿302(8)

Proof that lost will was not revoked by testator was not proof that it was in existence at date of his death, but fact that will was not revoked would be a patent circumstance tending to show that it was in existence at date of testator's death. Probate Code, § 350.

4. Wills ⚿302(8), 306

Where circumstances strongly indicate that testator did not destroy will, and that it could not have been destroyed by those who would have profited by its destruction, no great amount of evidence should be required to justify a finding that will has not been destroyed but has been lost. Probate Code, § 350.

5. Wills ⚿302(8)

If there is no evidence indicating that missing will was destroyed other than presumption that testator destroyed it, and there is substantial circumstantial evidence tending to prove that will was not destroyed, a court may properly find that will is in existence at time of testator's death. Probate Code, § 350.

6. Appeal and error ⚿996

Where two or more inferences can be reasonably deduced from facts, reviewing court cannot substitute its deductions for those of trial court.

7. Wills ⚿294, 712

The statute providing that devises to a subscribing witness are void unless there are two or more disinterested subscribing witnesses to will relates solely to devises to subscribing witnesses, and does not relate to their qualification as witnesses. Probate Code, § 51.

8. Wills ⚿712

The statute providing that devises to a subscribing witness are void unless there are two other and disinterested subscribing witnesses to will has no application to holographic wills, and, hence, a gift to a legatee by a holographic will is not invalidated by his signing the document as a witness. Probate Code, § 51.

9. Wills ⚿294

Where holographic will could not be found, sole beneficiary was not disqualified as a witness under statute to testify as to provisions in will for purpose of having instrument probated as lost will. Probate Code, §§ 51, 350.

* * *

Bailey & Poe, Henry C. Rohr, Los Angeles, for appellants.

J. M. Clements, Los Angeles, for respondent.

WILSON, Justice.

From a judgment and order dismissing their petition to revoke after probate the purported lost will of Thomas J. Reynolds, deceased, and confirming the order admitting such will to probate, petitioners appeal.

The sole question to be determined is whether the proponent of the will has met the statutory requirements for proving a lost will.

Section 350 of the Probate Code provides: "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. * * *"

There is no question of fraud or public calamity involved in the instant case. The evidence discloses that Mary Virgie Beustad, the proponent of the purported lost will and the sole beneficiary thereunder, went to live with decedent as his housekeeper in 1938 and remained with him until his death. There was an agreement between them that he would will his property to her as compensation for her services. Some time early in May, 1943, decedent executed a holographic will bequeathing all his property to respondent. He gave the will to her and she placed it for safekeeping in her dresser, in a box with other personal things, in the same drawer where decedent kept his rent receipt book. Respondent testified she was unable to find the will when she looked for it the day following the testator's death and the will has never been found.

[1] Appellants contend that the purported will does not satisfy the requirements of section 53 of the Probate Code in that there is no evidence showing the date of the will other than it was dated in May, 1943. The court inserted the date May 1st. One witness testified that the will was dated; that as near as he could remember the date on the will "was close to May 1st; that it had a date on it." Respondent testified that the will was dated and signed by decedent. This evidence is sufficient to support the finding that the will was dated. The fact that neither witness could recall the exact day of the month appearing in the date does not render the instrument invalid as a holographic will.

[2] Appellants further contend that the proponent failed to establish that the will was in existence at the time of the testator's death. They assert that since the testator had access to the document the presumption arises that he destroyed it animo revocandi and that there is no substantial evidence to overcome the presumption. Witness Cauthen testified that the testator had told him many times that when he died he wanted Mrs. Beustad to "have a roof over her head"; that on the Friday before his death, which occurred on Sunday, decedent was talking to him about painting the house and at that time he held up an envelope and asked the witness if he knew what it was, stating: "This is Virgie's will. When I pass on this will give her the houses." Witness Brooks testified that decedent had talked to him many times about his will; that "he said he owed it to her; that he felt better that he had made a will in her favor." Both witnesses testified the testator said that after the death of his mother and brother he had no relatives left. There is no evidence of any change in the attitude of the testator toward Mrs. Beustad. While it appears from the testimony of witness Cauthen that the testator had the will in his possession on the Friday before his death on Sunday, Mrs. Beustad testified that about 6:30 on that evening before leaving the house she took the envelope out of the drawer, lifted the flap and saw that the will was inside, and replaced the en-

velope in the drawer; that upon prior occasions when leaving the house she had secreted the will in various places in the house. Although the testator had access to the will, there is no evidence that he had it in his possession after the time Mrs. Beustad last saw it. The relationship between the testator and Mrs. Beustad was at all times friendly and cordial and he had given the will to her for safekeeping. The evidence is sufficient to overcome the presumption that the testator had destroyed the will with the intention of revoking it and to support the finding that it was in existence at the time of his death.

[3-6] In Re Estate of Boyer, 67 Cal. App.2d 83, 86, 153 P.2d 793, the court held that the testimony of the attorney who testified to the execution of the will and that he saw it on the testator's desk two months before his death, the testimony of an insurance agent that he substituted the names of the testator's sisters as beneficiaries of an insurance policy and evidence that during his last illness the testator repeated to a friend his prior declaration that he had made a will giving all to his sisters was competent proof that he had entertained no desire to revoke his will. While proof that the will was not revoked by the testator is not proof that it was in existence at the date of his death it is a patent circumstance tending to establish that fact. In re Estate of Moramarco, 86 Cal.App.2d 326, 337, 194 P.2d 740. As stated by the court in Re Estate of Moramarco, supra, where circumstances strongly indicate the testator did not destroy the will and there is not evidence that it could have been destroyed by anyone who would have profited by its destruction no great amount of evidence should be required to support a finding that it was not destroyed. If there is no evidence indicating the will was destroyed other than the presumption the testator destroyed it with the intention of revoking it, and there is substantial circumstantial evidence tending to prove it was not destroyed, the court may reasonably find that the will was in existence at the time of the testator's death. Furthermore, when two or more inferences can be reasonably deduced from the facts the reviewing court cannot substitute its deductions for those of the trial court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; In re Estate of Pohlmann, 89 Cal.App.2d 563, 567–568, 201 P.2d 446.

Appellants call attention to the statement of the court that "this is a pretty weak case." The statement referred to was made by the court when the will was admitted to probate, where the only question before the court was whether the proffered instrument was the will of decedent; it was not made at the time of the hearing on the contest of will after probate where the evidence was stronger, witnesses testified who were not present at the former hearing and all witnesses were thoroughly cross-examined.

[7-9] Finally, appellants assert that the provisions of the will were not proved by two credible witnesses since one of the witnesses was the sole beneficiary. It is their contention that since section 51 of the Probate Code provides that devises to a subscribing witness are void "unless there are two other and disinterested subscribing witnesses to the will" Mrs. Beustad, who is the sole beneficiary, cannot qualify as a credible witness. Section 51 of the Probate Code is specific and relates solely to *devises to subscribing* witnesses. It does not relate to their qualification as witnesses. Furthermore, a gift to a legatee by a holographic will is not invalidated by his signing the document as a witness. Probate Code section 51, former Civil Code sec. 1282, has no application to holographic wills. In re Estate of Zeile, 5 Coff.Prob. 292. Section 350 of the Probate Code relates to the manner in which a lost will may be proved and contains no reference to an attesting or a subscribing witness. It has no connection whatsoever with section 51. Section 1879 of the Code of Civil Procedure provides that, with certain exceptions not involved herein, "neither parties nor other persons who have an interest in the event of an action or proceeding" are excluded as witnesses but their credibility may be drawn in question.

In the Zeile case the court said: "The history of the disability of a witness to a will to take as a legatee or devisee thereunder, as having its basis in the common-law rule excluding an interested witness from testifying, leading to the result of invalidating many wills until legislation in England and in this country altered the situation by invalidating the gift and thus restoring the competency of the witness—is a familiar one * * * The next step in legislation and decision was to remove the witness' disability to receive the gift provided the will could be proved by other competent evidence."

In Re Dalbey's Estate, 326 Pa. 285, 192 A. 129, the court held that the decedent's widow, who was one of two witnesses called to prove the contents of a lost will and substantially the sole beneficiary under it, was not disqualified as a witness under the statute which in accord with the more modern viewpoint, said the court, recognizes the probative value of such testimony as outweighing the danger of perjury and limits the effect of the witness' interest to the question of credibility. We find nothing in the statutes of California which disqualifies the proponent as a witness because she is the sole beneficiary. The question of her credibility is for the determination of the trial court.

The cases cited by appellants are not to the contrary. In Re Kuehnel's Will, Sur., 52 N.Y.S.2d 617, the will was an unnatural one since it disinherited the widow and divided the estate between the testator's two brothers. The evidence with regard to the wife's having taken the will was held insufficient to overcome the presumption that the will had been destroyed by the testator with the intent to revoke it, or to establish the fraudulent destruction by the widow. In Re Beckerle's Will, Sur., 46 N.Y.S.2d 271, decedent's daughter offered for probate a copy of a will alleging the original had been lost or destroyed. Her testimony as to declarations by decedent made to her was held to be incompetent and inadmissible to establish the existence of the will at the time of death because the witness would gain by admission of the proffered instrument to probate. In Keery v. Dimon, 91 Hun. 642, 37 N.Y.S. 92, the decedent executed the purported lost will in 1882 and the last time there was any satisfactory evidence it was in existence was in 1885. The testator drew another will in 1891 which was substantially the same as the one sought to be established as a lost will and on which he subsequently obliterated the signatures. The death of the testator did not occur until 1893. The evidence was held to be insufficient to establish that the alleged lost will was in existence at the time of the testator's death.

In the instant case two disinterested witnesses testified to the fact that the testator had declared that he had no relatives. One of these witnesses testified the testator had asked him to draw a will for him, stating that he wanted to will his property to a woman by the name of Virgie; that she was living at his house as a housekeeper and he wanted to will his property to her because of an agreement he had with her "that she would get his property if she took care of his property or did his housekeeping until he died." This witness further testified that he told decedent he was not a lawyer and could not draw a will but that he had a will which had been made out by a lawyer; that he would copy it and if decedent wanted to take a copy and write it out on plain paper and date it and sign it, he could do so; that he gave decedent a copy of his will and decedent showed him the will which he made in which he bequeathed all his property to Virgie Beustad; that the will was in the handwriting of decedent; that many times thereafter decedent told him he was glad he had made a will in favor of Mrs. Beustad. The other disinterested witness testified to the declarations of decedent on the Friday before his death as hereinabove related. Furthermore, his will was a natural one for him to make since (1) it was in fulfillment of his agreement with Mrs. Beustad, (2) her services as his housekeeper and her attention to his property over a period of years furnished a valid consideration for the bequest, (3) according to his declarations he had no relatives. His belief that he was without kin is substantiated by the fact that there is no evidence that any of the contestants ever visited him or made themselves known to him; none of them testified at the trial.

Judgment and order affirmed.

MOORE, P. J., and McCOMB, J., concur.

VERDIER v. VERDIER.

Civ. 14127.

District Court of Appeal, First District,
Division 2, California.

Nov. 17, 1949.

Hearing Granted Jan. 12, 1950.*

Alexandrine Verdier sued Paul Verdier for permanent support and maintenance.

The Superior Court for City and County of San Francisco, William F. Traverso, J., rendered an order discharging an order to show cause why defendant should not pay plaintiff's support pendente lite, and plaintiff appealed.

The District Court of Appeal, Nourse, P. J., reversed the order, and held that the existence of a separation agreement providing for the support of the wife did not prevent the institution of the action nor the granting of relief pendente lite.

1. Husband and wife 🔑288

Generally, when a separation agreement providing for support of wife has been breached or repudiated by the husband, the existence of the agreement is not prevent granting of relief pendente lite maintenance.

2. Husband and wife 🔑295

Existence of a separation agreement attacked in separate maintenance action itself on ground of fraud or coercion does not prevent granting of relief pendente lite prior to a decision as to the validity of the agreement.

3. Husband and wife 🔑281

Where action instituted by wife is for enforcement of support provisions of separation agreement as such, wife is not entitled to relief pendente lite allowable in actions for divorce or separate maintenance.

4. Husband and wife 🔑288, 295

Existence of separation agreement providing for support of wife would not prevent institution of an action by wife for permanent maintenance and support nor the granting of relief pendente lite by the trial court. Civ.Code § 137.

5. Husband and wife 🔑285½, 295

When support is stipulated in separation agreement, failure of husband to provide it can be willful and will give rise to an action by wife for permanent support and maintenance, and relief pendente lite may be granted therein. Civ.Code, § 137.

6. Divorce 🔑209
Husband and wife 🔑295

With respect to granting of temporary relief, divorce actions and actions for permanent support and maintenance are governed by same statutes. Civ.Code § 137.

7. Husband and wife 🔑4

Public policy requires the protection of the wife, and the state has an interest in her support lest she become a public charge.

8. Divorce 🔑1

Policy of the law is opposed to divorce.

9. Husband and wife 🔑285½

Purpose of amendment of statute permitting wife to maintain an action for permanent support and maintenance without applying for divorce was to enlarge wife's right of action to leave open hope of reconciliation and to prevent a husband from starving an innocent wife into necessity of suing for a divorce, and statute is remedial in character, and therefore must be liberally construed. Civ.Code, § 137.

10. Husband and wife 🔑278(3)

Property settlement agreements occupy a favored position in law of the state and are preferred by courts to litigation.

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* Subsequent opinion 223 P.2d 214.

11. Husband and wife ⚷205(6)

Power to allow alimony and counsel fees to wife in divorce action in order to enable her to live pending the action and to present her defense must be regarded as incidental and necessary in all matrimonial actions.

12. Divorce ⚷214(4)

Merits of divorce case, where there is no issue as to marriage, will not be considered on an application for temporary alimony further than is necessary to determine that wife is proceeding in good faith.

◆

Morgan J. Doyle, J. Joseph Sullivan, San Francisco, attorneys for defendant and respondent.

James M. MacInnis, Hallinan, MacInnis & Zamloch, San Francisco (William F. Cleary, San Francisco, of counsel), attorneys for plaintiff and appellant.

NOURSE, Presiding Justice.

Plaintiff, wife, appeals from an order discharging an order to show cause why defendant should not pay her support pendente lite, travel expenses to attend hearings, attorney's fees and further interim relief. On October 8, 1948, she filed a complaint entitled "For Maintenance, Division of Community Property, and Other Relief," in which she alleged in substance, that the parties married on December 27, 1918; that on January 10, 1937, they entered into an agreement, appended to the complaint as Exhibit A, in which they agreed among other things that they would live separate and apart and that the husband would pay the wife for her support and maintenance $500 monthly, and, in case his income increased, then he should pay one-half of such increase; that since then the parties had been living separate and apart; that during that time according to plaintiff's information and belief defendant's income had increased but that he failed to pay the sum of $500 per month in full so that in March, 1942, $3000 or more was unpaid; that defendant falsely represented to plaintiff at that time and repeatedly thereafter that he was unable to pay more than approximately $250 per month and refused to give any further information with respect to his income and financial position; that on May 11, 1946, the arrears amounted to $20,000 or more and that on that date plaintiff, who had no separate income, was induced by the false representations of defendant and by her lack of funds and means of support to sign an agreement, appended to the complaint as Exhibit B, which amended the agreement of January 10, 1937, among other things in that the monthly payment for support was reduced to a fixed amount of $400 and that plaintiff would be paid $10,000 in full discharge of existing arrears; that in the agreement Exhibit B defendant agreed to cause Joseph R. Bearwald and Suzanne de Tessan to guarantee the monthly payments of $400 but that plaintiff never received a guaranty signed by said Bearwald and is informed that Bearwald never executed such document; that from May 11, 1946, until July, 1948, defendant paid $400 a month since that date refuses to pay any sum whatsoever; that if Exhibit B became a contract plaintiff has elected to rescind it without waiver of other grounds of attack on it; that accumulation of community property was made during the marriage of the parties, with respect to which defendant failed to account to plaintiff and an audit will be necessary; that plaintiff has exhausted all her resources and has no income or property or other means of support to provide for herself and to maintain this action; that according to her information and belief defendant has ample means with which to enable her to do so, but that she is ignorant of his income, resources and community property, so that an auditor will have to be employed. On these grounds she prayed for judgment determining the community rights of the parties, disposing of said community property and providing for the permanent support and maintenance of plaintiff, for cancellation of the agreement Exhibit B and for interim relief consisting of $250 travelling expenses of plaintiff from New York to San Francisco; $1000 per mouth for support and maintenance; $1000 on account of expenses of the action; $1500 on account of auditor's fees and $5000 on account of attorney's fees. An injunction also prayed for is not here involved.

It may be pointed out that, although the validity of the original agreement (Exhibit A) is not attacked as is the case with the amending agreement (Exhibit B), the prayer is not for specific performance of the original agreement but for "permanent support and maintenance" as mentioned in § 137 of the Civil Code. In response to an order to show cause why the interim relief prayed for should not be granted defendant filed a return stating that the court is without power or jurisdiction to order the payment of any support, costs or fees pendente lite in this action, that both agreements (Exhibits A and B) were prepared by plaintiff's attorney and that the same attorney as her agent consented to the reduction of the monthly payments to $250 from March, 1942, to May, 1946; that the reason for the signing of the amending agreement (Exhibit B) was a severe illness of defendant, which incapacitated him for many months and threatened to cause his death; that the payments of $400 monthly in accordance with the amended agreement had been made and accepted regularly until July 30, 1948, but that the next three payments were prevented by garnishments and attachments of all money owed by defendant to plaintiff for a sum of $1,232.74, which writs caused defendant to pay three amounts of $400 each to the sheriff; that defendant never defaulted in the payments in accordance with the amended agreement and paid or advanced plaintiff moreover several additional amounts; that he also paid $15,000 concurrently with the signing of the agreement Exhibit B, instead of the amount of $10,000 provided for in that agreement; that the signature of Bearwald to a guaranty was not procured because plaintiff waived it.

By these pleadings the present effectiveness of and compliance with both agreements were put in issue, plaintiff contending that the agreement Exhibit B was void, incomplete and rescinded, and the original agreement (Exhibit A) unchanged but not complied with either before or after May, 1946, defendant contending that the original agreement was twice validly amended and as amended complied with.

At the hearing as well as on this appeal defendant took the position that the court lacked jurisdiction to grant any interim relief on the ground that the parties were living separate and apart by virtue of the agreement Exhibit A, the validity of which is not attacked, and that then according to § 175, Civil Code, the wife has no right to support other than that stipulated in the contract, and in case of violation only an action on the contract in which no relief pendente lite can be granted as in an action for separate maintenance. He moreover contended that the contract was not violated as payment was prevented by the garnishment and attachment. It was, however, brought out that the alleged garnishment was for a claim of "The City of Paris" of which defendant was a director and plaintiff offered to prove collusion and bad faith in that respect. The court stated repeatedly that the question before it was whether or not the court had jurisdiction to award relief pendente lite where the parties were living separate and apart and the support was provided for by agreement; that plaintiff was seeking to enforce the provision of the original agreement in accordance with § 175, Civil Code, and that where an existing agreement was not attacked the recent Supreme Court case of Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909, prevented relief pendente lite. It is therefore clear that when the court discharged the order to show cause it did not deny relief pendente lite in the exercise of its discretion but held as a matter of law that it lacked jurisdiction to grant such relief under the circumstances of this case, the correctness of which holding we must review.

[1–3] The question in how far the existence of a separation agreement providing for support of the wife prevents the institution of an action for permanent maintenance and support and the granting of relief pendente lite seems not to have been decided before in this State. The decision in other jurisdictions are somewhat conflicting. See annotation 6 A.L.R. 75 et seq.; 42 C.J.S., Husband and Wife, § 612, page 211;

27 Am.Jur. 20. It is mostly held, as in Bailey v. Dillon, 186 Mass. 244, 71 N.E. 538, 66 L.R.A. 427, that if such an agreement is freely and fairly entered into and is still in force it operates as a bar to an action of the wife for separate maintenance. However, it has also been held that such an agreement does not deprive the court of power to take cognizance of an action for separate maintenance and support but that the agreement must be considered with all other circumstances as basis for the decision. Bradford v. Bradford, 296 Mass. 187, 4 N.E.2d 1005. It is generally held that when a separation agreement providing for the support of the wife has been broken or repudiated by the husband it is not a defense to a wife's suit for separate maintenance. Cram v. Cram, 116 N.C. 288, 21 S.E. 197; Walker v. Walker, 125 Md. 649, 94 A. 346, 350, Ann.Cas. 1916B, 934; Scheinkman v. Scheinkman, 64 Misc. 443, 118 N.Y.S. 775. That a separation agreement procured by fraud or overreaching cannot constitute such a defense is obvious. In that respect the question could be only whether, as contended by respondent, such an agreement if not invalid on its face would bar a separate maintenance action and interim relief until it was declared invalid by the court. In Daniels v. Daniels, 9 Colo. 133, 10 P. 657; State ex rel. Turner v. Paul, 182 Wash. 261, 46 P.2d 1060; and Wilkinson v. Wilkinson, 130 N.J. Eq. 65, 20 A.2d 417, it was held that the existence of a separation agreement attacked in the separate maintenance action itself on the ground of fraud or coercion did not prevent the granting of relief pendente lite prior to the decision as to the validity of the agreement. It has been held that if the action instituted by the wife is for the enforcement of the support provisions of the separation agreement as such she is not entitled to the relief pendente lite allowable in actions for divorce or separate maintenance, 42 C.J.S. Husband and Wife, § 607, page 196; Hite v. Hite, 142 Ky. 283, 134 S.W. 138; Phillips v. Peacock, 63 Misc. 520, 117 N.Y.S. 625. The latter case expressly points out the distinction that if the wife notwithstanding the existence of a contract elects to stand on her rights to support as a wife, relief pendente lite could be granted.

[4] On the basis of the above authorities from other jurisdictions it would seem that the court had the power to grant the relief pendente lite prayed for. As already pointed out, the action instituted is one for permanent support and maintenance in an amount left to the discretion of the court, not for the enforcement of the separation agreement in the amount stipulated. The complaint contains the necessary allegations for an action of the former kind by showing the marriage, and the ability and deliberate failure of the husband to provide for the wife. The cases cited recognize the right to relief pendente lite in such action. According to these authorities neither of the two agreements (Exhibit A and B) can be considered to bar such action or relief pendente lite so long as the issues raised by the allegations that neither was duly performed by defendant and that the latter moreover was void had not been tried and decided by the court.

[5] We find nothing in our statutory or case law contrary to these conclusions. Section 137 of the Civil Code permits the wife to maintain an action for permanent support and maintenance without applying for a divorce "when the husband wilfully fails to provide for the wife". The same section empowers the court to grant her in its discretion during the pendency of such action amounts necessary for alimony, costs of action or attorney's fees. The complaint taken in its entirety sufficiently alleges facts which if true constitute wilful failure to provide for the wife, unless under the circumstances alleged the husband would be under no duty to support her, in which case the failure to provide would not be wilful. 1 Cal.Jur. 1027. It has been held that a wife living separate and apart from her husband by an agreement which does not provide for her support can not maintain an action for permanent support and maintenance, Jenny v. Jenny, 178 Cal. 604, 174 P. 652; Mayr v. Mayr, 161 Cal. 134, 118 P. 546, in accordance with the rule of § 175, Civil Code, providing that the husband is not liable for the support of the wife "when she is living separate from him, by agreement, unless such support is stipulated in the agreement."

However, this same provision clearly implies that when support is stipulated, as in the case before us, the husband is liable for support; his failure to provide it can thus be wilful and give rise to an action for permanent support and maintenance. Section 137, Civil Code, does not distinguish between a failure to provide the support stipulated in a separation agreement in accordance with § 175, Civil Code, and a failure to provide the support impliedly contracted for by the act of marriage in accordance with § 155, Civil Code. In both cases a husband liable for the support of his wife fails to provide for her and she is entitled to institute the action for permanent support and maintenance and may be granted the relief pendente lite provided for. That an unfulfilled agreement to provide for a wife living apart from her husband by consent does not in this state absolve the husband from his statutory obligations of support is also indicated by Bay Dist. Claim Service v. Jones, 136 Cal.App.Supp. 789, 24 P.2d 977, in which case it was held that under these circumstances the husband in accordance with section 174 of the Civil Code was liable to third persons for necessaries furnished by them to the wife.

[6] Neither can anything to the contrary be derived from the case of Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909, supra. In that case it was held that a trial court abused its discretion in refusing to consider as evidence bearing upon the wife's right to support pending a divorce action separation agreements in which the wife for a valid consideration waived her rights to support and attorney's fees, the validity of the agreements having been upheld in prior proceedings and presently not being attacked by the wife, and in granting relief inconsistent with the provisions of these agreements. The court expressly stated that the cases of Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715 and Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713, had not been overruled; these cases upheld awards of temporary alimony and counsel fees pending trial of the issue in regard to the right to divorce and the validity of property settlement agreements in which the wife had waived all rights to alimony, counsel fees, and costs but which agreements were attacked by the wife as fraudulent and void. 32 Cal.2d 520, at page 524, 196 P.2d 909. The agreements in the case before us do not contain any waiver of temporary alimony, counsel fees or costs and no such waiver can be read into them as they must be strictly construed so as not to deprive a spouse of rights unless there is a clear and unmistakable intention to barter them away. Compare Barham v. Barham, 33 Cal.2d 416, 427, 202 P.2d 289. The granting of such relief would therefore in this case not be inconsistent with the provisions of the agreements. Moreover the amending agreement (Exhibit B) is being attacked as fraudulent by the wife as in the Steinmetz and Locke Paddon cases, and she does not oppose but invites the consideration by the court of the provisions of the original agreement (Exhibit A) in deciding her right to temporary and permanent relief. With respect to the granting of temporary relief we see no difference between divorce actions as involved in the Patton, Locke Paddon and Steinmetz cases and an action for permanent support and maintenance as instituted in this case. Both are governed by the same provision of § 137, Civil Code.

[7-12] Our conclusion that under the circumstances of this case the trial court had power to grant relief pendente lite is in accord with the policies maintained in this state in the field of matrimonial relations. Public policy requires the protection of the wife, Adams v. Adams, 29 Cal.2d 621, 627, 177 P.2d 265; the state has an interest in her support lest she become a public charge. Miller v. Superior Court, 9 Cal.2d 733, 739, 72 P.2d 868. The policy of the law is opposed to divorce. Hiner v. Hiner, 153 Cal. 254, 256, 94 P. 1044. The purpose of the amendment of section 137, Civil Code permitting the wife to maintain an action for permanent support and maintenance without applying for divorce was to enlarge her right of action, to leave open the hope of reconciliation and to prevent a husband from starving an innocent wife into the necessity of

suing for a divorce. It is remedial in character and therefore to be liberally construed. See Hiner v. Hiner, supra, 153 Cal. 254, at page 257, 94 P. 1044; Benton v. Benton, 122 Cal. 395, 398, 55 P. 152; Sweasey v. Sweasey, 126 Cal. 123, 129, 58 P. 456. Property settlement agreements occupy a favored position in the law of this state and are preferred by the courts to litigation. Adams v. Adams, supra, 29 Cal.2d 621, 624, 177 P.2d 265; Hensley v. Hensley, 179 Cal. 284, 287, 183 P. 445, 446. "The power to allow alimony and counsel fees to the wife, in order to enable her to live pending the action, and to prevent her defense, [or her right of action] if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power, the rights of the woman, in many cases, could not be adequately protected." Dunphy v. Dunphy, 161 Cal. 87, 91, 118 P. 445, 446, quoting from Higgins v. Sharp, 164 N.Y. 4, 8, 58 N.E. 9. "The merits of the case, where there is no issue as to the marriage, will not be considered on an application for such alimony further than is necessary to determine that the wife is proceeding in good faith * * *." Kowalsky v. Kowalsky, 145 Cal. 394, 395, 78 P. 877. "If the court were compelled to try and determine the issues in the case before it could allow alimony, the entire purpose of allowing alimony 'during the pendency of such action' would be defeated." Storke v. Storke, 99 Cal. 621, 622, 34 P. 339, 340.

To hold with respondent that a wife who has entered into a separation agreement with stipulation of support and who alleges that the husband fails to perform it can in no action short of divorce receive temporary relief to enable her to litigate her husband's duty to provide for her, unless the agreement has first been set aside by court decision, would run counter to all principles stated above. It is sufficient for the purpose of this case to decide that the court under the circumstances has power to grant the wife alimony pendente lite, costs and counsel fees when the action instituted is for permanent maintenance and support based on her conjugal rights. On the question whether the same relief is also allowable in this state when the action is purely on the contract to enforce the amount of support stipulated we express no opinion.

The order is reversed.

DOOLING, J., concurs.

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94 Cal.App.2d 667

MARKOWITZ et al. v. CARPENTER et al.

Civ. 17055.

District Court of Appeal, Second District,
Division 2, California.
Nov. 17, 1949.

Harry L. Markowitz and Ruth S. Markowitz brought suit against Charles B. Carpenter, Jr., and others, to quiet title to realty.

The Superior Court of Los Angeles County, Carl A. Stutsman, J., rendered a judgment adverse to the named defendant, and he appealed.

The District Court of Appeal, Moore, P J., affirmed the judgment, holding that evidence sustained finding that named defendant's ability to conduct his defense was not materially affected by reason of his military service in the naval reserve, that refusal of Superior Court to grant a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act was not error, and that the tax deeds on which the plaintiffs relied were not void for any of the reasons claimed.

1. Army and navy 🔑34

Where evidence in action to quiet title to realty sustained finding that ability of one of the defendants to conduct his defense was not materially affected because he was a member of the naval reserve and was subject to active service, refusal to grant a stay of proceedings to defendant under the Soldiers' and Sailors' Civil Relief Act was not error. Soldiers' and Sailors' Civil

Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

2. Evidence ⚷343(3)

In action to quiet title to realty by plaintiffs claiming title by virtue of tax deeds to the state, instruments which were photostatic copies of the tax deeds, and which were certified by county recorder to the true copies of the tax deeds, were competent evidence. Code Civ.Proc. § 1893.

3. Acknowledgment ⚷52

Where there was no evidence that tax deeds did not bear signature of tax collector, and certificates of acknowledgment on deeds showed that collector appeared before officer and acknowledged his execution of the deeds, evidence in action to quiet title was prima facie proof of due execution of the deeds, in absence of evidence to the contrary.

4. Acknowledgment ⚷20(1)

Tax deeds were not void because acknowledgments of tax collectors were taken by deputy county clerks. Code Civ.Proc. §§ 1948, 1951; Pol.Code, §§ 4013, 4314; Government Code, § 1194; St.1913, p. 1484, art. 3, § 11(3).

5. Taxation ⚷758

Tax deeds were not void because of abbreviations of the names of the assessee, in view of statutory provisions that a mistake in the name of an owner or supposed owner of realty does not render invalid an assessment or any tax sale. Revenue and Taxation Code, § 613.

6. Taxation ⚷656

Where lot was sold to the state on September 2, 1933, for taxes assessed in 1932, sale of the lot by the state on July 1, 1938, was authorized, over objection that sale by state was made before expiration of five-year period of redemption. Pol. Code, § 3764.

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J. Everett Brown, Los Angeles, for appellant.

Alfred L. Armstrong, Hollywood, for respondents.

MOORE, Presiding Justice.

This is an appeal by defendant Carpenter from a judgment quieting title in plaintiffs to certain real property situated in Los Angeles County. The complaint alleged plaintiffs' ownership of the lands, and the adverse claims of defendants and prayed that the latter be adjudged to have no interest therein. Appellant denied all allegations of the complaint and alleged "that plaintiffs are barred in the prosecution of this action * * * as provided in the Soldier's Civil Relief Act of 1941 [50 U.S.C.A. Appendix, § 501 et seq.] * * * as this answering defendant is in the Military Service of the United States * * * Naval Reserve."

Appellant did not appear at the trial although he was not on active duty as testified by his own attorney who objected to the introduction in evidence of the documents evidencing plaintiffs' alleged ownership. This proof was offered to show title in plaintiffs by virtue of the usual tax deeds to the State of California resulting from a sale for delinquent taxes and a transfer by the State to the City of Santa Monica and its grant to plaintiffs. The specific objection raised was that the instruments had not been validly executed and acknowledged.

The court found that plaintiffs were the owners, that defendants had no right, title or interest in the lands and that appellant "is now a member of the United States Naval Reserve and is subject to active service but is not now in active service, and that the ability of said defendant Charles B. Carpenter, Jr. to conduct his defense to this action is not materially affected by reason of the fact that he is a member of the United States Naval Reserve." On these facts the court entered judgment for plaintiffs.

It is now contended as grounds for reversal that appellant's military status inhibited entry of a judgment against him, and that the various conveyances to plaintiffs were invalidly executed and acknowledged.

Neither the pleadings, the evidence, nor the briefs on this appeal indicate in what manner appellant or the property involved come within the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 560. There is nothing in the record to indicate that as an inactive Naval Reservist, he was entitled to the protection of the Soldiers' and Sailors' Civil Relief Act of 1940. No authorities are cited and none has been found holding that a person in an inactive military status can claim the benefits of that act. Furthermore, the finding that appellant's connection with the naval reserve did not affect his ability to defend the action is supported by testimony that Carpenter was in Los Angeles at the time of the trial.

[1] The only portions of 50 U.S.C.A. § 560, cited by appellant, are subdivisions 3 and 4: (3) "When by law such property may be sold or forfeited to enforce the collection of a tax or assessments, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service * * *." (4) "Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon." It does not appear how the quoted sections are in any way applicable to the facts here involved. However, section 521 of the Soldiers' Civil Relief Act is applicable: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, *unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense* is not materially affected by reason of his military service." (Emphasis added.) In view of the finding that appellant's ability to conduct his defense was not materially affected by reason of his military service, the refusal of the court to grant a stay of proceedings was not error. Johnson v. Johnson, 59 Cal.App.2d 375, 382, 139 P.2d 33; Ridley v. Young, 64 Cal.App.2d 503, 149 P.2d 76.

[2, 3] The contention is made that the tax deeds were invalid because they were not signed by the tax collector but that instead "his signature was affixed by rubber stamp and in two instances printed in the deed." No original deeds were received in evidence. The instruments introduced were photostatic copies of the records of deeds, each being certified by the county recorder to be a true copy of the recorded instrument it purports to be. As certified copies of public records they are competent evidence of the deeds executed by the tax collector. Code Civ.Proc. sec. 1893. There is no evidence that the instruments do not bear the signature of the tax collector. On the contrary the certificate of acknowledgment on each deed shows that the collector appeared before the officer and acknowledged his execution of the instrument. Such evidence is sufficient prima facie proof of the due execution of a deed in the absence of evidence to the contrary. Thomas v. Fursman, 177 Cal. 550, 553, 171 P. 301. The certified copies of the deeds were therefore competent evidence of their execution by the tax collector. Code of Civ.Proc., secs. 1948, 1951.

[4] Appellant contends that the deeds are void by virtue of the collector's acknowledgement having been taken by a deputy tax collector. The only evidence of such assertion is the testimony of a deputy tax collector that F. B. Murphy who took two of the acknowledgments was chief deputy in charge of tax sales. Mr. Ling who took five of the acknowledgments and Mr. Schwab who took two of them were mere clerks in the collector's office. Could they not at the same time have been deputies of the county clerk? A deputy county clerk is authorized to take acknowledgments. Pol.Code, secs. 4314, 4013. Every county officer shall have the powers and

perform the duties prescribed by the general law, the charter and ordinances and every assistant officer and each deputy shall have the powers and may perform the duties attached to the office of his principal. Government Code, sec. 1194; Administrative Code of Los Angeles County, secs. 30, 31. The acts of the above named deputy clerks in taking the acknowledgments of the Tax Collector are not illegal or novel in Los Angeles county. The Board of Supervisors is authorized to provide by ordinance for the number of assistants, deputies, clerks and attaches under a county officer and for their compensation. Los Angeles County Charter, Art. III, sec. 11, subsec. 3, Stats.1913, p. 1484. Pursuant to such authorization the Board has for over 20 years enacted successive ordinances similar to that of May 27, 1947, known as Ordinance 4935, and commonly designated as the Salary Ordinance. Article 23 of such ordinance provides for the appointment of 2500 deputy county clerks without compensation. Those deputies are parcelled out among the deputies of other county departments in order to facilitate the administration of county business. The above named deputy county clerks are three of such appointees whose gratuitous labors effect important services and a financial saving to the county. The sales and conveyances of lands to enforce the payment of delinquent taxes are in effect bookkeeping schemes to evidence compliance with the law. That the tax collector executed a deed may as well be certified by a clerk in his office as well as by any notary public so long as he is cloaked with the necessary power. No authority is cited and none has been found that nullifies the cited provisions of the county charter or those of the county ordinances or that prohibits a deputy or a clerk in one county office from holding an appointment under another.

[5] Appellant next contends that the deeds are void because assessed to "Metropolitan Tr. Co." and that it is impossible to determine what is meant by "Tr." or "Co." The answer to this argument is that "A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale." Revenue and Taxation Code, § 613. While the name of the assessee of movable property requires extreme care in obtaining the exact name of the owner the last quoted section relieves the assessor of the obligation to avoid abbreviations in assessing realty. See Lake County v. Sulphur Bank Quicksilver Mining Co., 66 Cal. 17, 21, 4 P. 876.

[6] Appellant's final contention is that the sale of Lot 9, Block G, was made before the expiration of the five-year period of redemption. The lot was sold to the State of California on September 2, 1933, for taxes assessed in 1932, and was sold by the State on July 1, 1938. The applicable code section in 1933 was section 3764 of the Political Code. However, the legislature in 1933 enacted the following: "Sec. 4. Notwithstanding the provisions of section 3764 of said code [Political], sales of property sold to the State for delinquency in payment of taxes for the fiscal year 1932–33 shall be made in the year 1938, at the same time and in the same manner as if no extension of time or postponement of sale to the State, in accordance with the terms of this act, had been made. The words 'five years' as used in said section 3764 shall be construed to mean and include the period of time that will elapse between the actual date of such sale in the year 1933 and the time fixed by law for the sale by the State of such property in the year 1938." Statutes of 1933, page 1520.

The quoted provision clearly authorized the sale by the State in 1938 at the time fixed by law during that year by virtue of the definition of "five years" contained therein.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 858

BILLETTER v. POSELL et al.

Civ. 17194.

District Court of Appeal, Second District,
Division 2, California.
Nov. 30, 1949.

Vilma A. Billetter sued Jules Posell and others for wrongful discharge from employment.

The Superior Court of Los Angeles County, Philip H. Richards, J., rendered a judgment for the plaintiff, and Jules Posell and Jules Posell, doing business as Jules Posell Sportswear, appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment and held that the evidence sustained the finding that defendants breached the employment contract, and that defendants were not entitled to credit for the amount they offered to pay plaintiff as a salary in a different line of work in mitigation of damages.

McComb, J., dissented.

1. Master and servant ⚷40(3)

Evidence sustained finding that defendants had employed plaintiff for a period of one year, and that they breached the employment contract, so that plaintiff was entitled to recover balance owing to her for remainder of contract period.

2. Master and servant ⚷41(6)

In action by employee against former employer for wrongful discharge to recover balance owing under employment contract for remainder of contract period, written offer of employment made by third party on which oral employment contract between parties was based was admissible.

3. Master and servant ⚷42(1)

Payments from state unemployment compensation fund received by employee wrongfully discharged were not deductible by defendant employer as compensation received by employee from other employment in mitigation of damages. Gen.Laws, Act 8780d, § 1.

4. Master and servant ⚷41(1)

Benefits received from state unemployment compensation fund are intended to alleviate the distress of unemployment and not to diminish amount which an employer must pay for damages for wrongful discharge of an employee. Gen.Laws, Act 8780d, § 1.

5. Master and servant ⚷42(3)

When a person is employed for a definite period of time at an agreed rate of wages and is wrongfully discharged before expiration of period for which he was employed, he may refuse his former employer's offer of re-employment at less wages than were stipulated in original contract of employment when acceptance of such offer would amount to modification of original contract or to a waiver of right to recover according to its terms.

6. Master and servant ⚷42(3)

An employee is not required to perform the same work for a less price in mitigation of damages, so that an offer of an employer who has wrongfully discharged employee to continue employment at a lower rate of wages is not a defense, in action for breach of contract of employment.

7. Master and servant ⚷42(3)

An employee, on wrongful discharge, is not required to choose between making a new agreement with his employer and losing all his rights under the old one, and is not bound to accept a new employment from same employer unless work is in same general line of the first employment and offer is made in such manner that his acceptance will not amount to a modification of original agreement.

8. Master and servant ⚷42(3)

If an employee is offered his former employment for same time and at same rate of wages for which he was originally employed, or is otherwise protected against loss, he is barred from recovery of damages for wrongful discharge.

9. Master and servant ⚷42(3)

One who has been prevented from performing a contract of service should not be required to accept a new employment under circumstances which permit the claim that he consents to a modification of the original contract and an abandonment of his right of action under it.

10. Master and servant ⚷37

Acceptance by employee of employer's offer to work in a different line of work at smaller wages than stated in oral contract, would have precluded employee from recovering under original contract since arrangement would have signified her consent either to a new contract or to a modification of old one, and would have constituted a waiver of any right to claim under former contract.

11. Master and servant ⚷42(3)

A discharged employee is not required to accept re-employment from his employer if acceptance would sacrifice his right to claim damages to which he is entitled by reason of violation of contract by employer.

12. Master and servant ⚷42(3)

Where employers' offer to continue employee in their employ at a lower salary than agreed on in oral contract was not so qualified as to preserve employee's rights under contract, and acceptance of such offer would have modified employment contract and waived any right to recovery thereunder, employers were not entitled to credit for amount they offered to pay in mitigation of damages in employee's action for wrongful discharge.

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Bernbaum, Kleinrock & Freeman, of Los Angeles, for appellant.

Lyle W. Rucker, Los Angeles, for respondent.

WILSON, Justice.

Alleging that she was employed by defendants for a period of one year at an agreed salary and was wrongfully discharged before the expiration of the employment period, plaintiff brings this action to recover the balance owing to her for the remainder of the contract period. From a judgment in favor of plaintiff, defendant Posell appeals.

On or about July 1, 1946, plaintiff and defendants entered into an oral contract whereby plaintiff was employed as a floor lady and designer for the period of one year commencing July 1, 1946, and ending June 30, 1947, at an agreed salary of $75 per week and as additional compensation a Christmas bonus of $500 to be paid to her on or about December 25, 1946. About December 31, 1946, defendants terminated plaintiff's employment without cause under the circumstances hereinafter related.

Defendants contend the evidence is insufficient to sustain the findings (1) that they had employed plaintiff for a period of one year, and (2) that they breached the employment contract.

Plaintiff testified that shortly prior to July 1, 1946, while in the employ of defendants, she told them she desired to resign her position with them for the reason that she had been offered an employment contract by another establishment for one year at $75 per week and a bonus of $500 at Christmas time; the proposed contract was in writing; at defendant Levy's request she gave him the contract and after reading it he said they would give her the $75 per week for a year and the $500 Christmas bonus—they would give her that or better; he threw the contract into the waste paper basket and thereupon called defendant Posell and told the latter he had made the arrangement above outlined. She further testified that during the Christmas holidays defendants told her they had decided to have another designer and to have plaintiff take the place of a floor lady at a salary of $55 per week. Being unwilling to accept the reduction in salary plaintiff left defendants' employ.

Plaintiff received $75 per week until the end of 1946 and $300 on account of the Christmas bonus.

[1] The foregoing evidence sustains the findings complained of by defendants and since the evidence of the latter, contradictory of plaintiff's testimony, merely creates a conflict it need not be related. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756.

[2] The contract which Levy threw into the waste paper basket, having been recovered and retained by plaintiff, was offered and received in evidence. Defendants' contention that the court erred in ad-

mitting it is untenable. It was offered for the purpose of showing the terms upon which plaintiff had been employed. The document was not a self-serving declaration; its contents were known to both parties, and the terms of plaintiff's employment were adopted from it.

[3, 4] During the time when plaintiff was unemployed she received payments from the State Unemployment Compensation Fund. Defendants contend they should be allowed credit for the moneys so received by her. Such funds are not deductible as compensation received from other employment in mitigation of damages. Benefits of this character are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee. Bang v. International Sisal Co., 212 Minn. 135, 4 N.W.2d 113, 116, 141 A.L.R. 657. See sec. 1, Cal. Unemployment Ins. Act, 3 Deering's Gen.Laws, 1944 ed., p. 3322, Act No. 8780d.

At the time plaintiff's employment terminated defendants offered to continue her in their employ at the rate of $60 per week and she refused to work for less than $65. Contrary to defendants' contention they are not entitled to credit for the amount they offered to pay her.

[5] When a person is employed for a definite period of time at an agreed rate of wages and is wrongfully discharged before the expiration of the period for which he was employed, he may refuse his former employer's offer of re-employment at less wages than were stipulated in the original contract of employment when acceptance of such offer would amount to a modification of the original contract or to a waiver of his right to recover according to its terms. Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S.W. 242, 245; Jackson v. Independent School Dist., 110 Iowa 313, 81 N.W. 596, 597; Chisholm v. Preferred Bankers' Life Assur. Co., 112 Mich. 50, 70 N.W. 415, 416; Miller v. Abraham, 159 Ark. 493, 252 S.W. 15; People's Co-op. Ass'n v. Lloyd, 77 Ala. 387, 390; Wachs v. Friedmann, 11 Mo.App. 602; Whitmarsh v. Littlefield, 46 Hun, N.Y., 418; Hussey v. Holloway, 217 Mass. 100, 104 N.E. 471, 472; Americus Grocery Co. v. Roney, 129 Ga. 40, 58 S.E. 462; Trawick v. Peoria & Ft. C. St. Ry. Co., 68 Ill.App. 156, 159; Sparta School Twp. v. Mendell, 138 Ind. 188, 37 N.E. 604, 606; Curtis v. A. Lehmann & Co., 115 La. 40, 38 So. 887, 888; Howard v. Vaughan-Monnig Shoe Co., 82 Mo. App. 405, 410; Prichard v. Martin, 27 Miss. 305, 310.

[6, 7] It is the rule that an employee is not required to perform the same work for a less price in mitigation of damages, and an offer of an employer who has wrongfully discharged the employee to continue the employment at a lower rate of wages is not a defense. Chisholm v. Preferred Bankers' Life Assur. Co., supra; Redfield v. Boston Piano & Music Co., 183 Iowa 194, 165 N.W. 365, 366; Whitmarsh v. Littlefield, supra. An employee, upon wrongful discharge, is not required to choose between making a new agreement with his employer and losing all his rights under the old one. He is not bound to accept a new employment from the same employer unless (1) the work is in the same general line of the first employment, and (2) the offer is made in such manner that his acceptance will not amount to a modification of the original agreement. Jackson v. Independent School Dist., supra.

[8] Cases are cited in a note in 72 A.L.R. 1054 to the effect that an employee who has been wrongfully discharged must accept his employer's offer of re-employment in order to reduce the damages where the offer may be accepted in such manner that it will be *without prejudice* to the discharged employee's rights under his original contract. There is nothing in those cases contrary to the general rule above stated. In each of them the employee was fully compensated or his rights under his contract were properly protected. If the employee is offered his former employment for the same time and at the same rate of wages for which he was originally employed or is otherwise protected against loss he is barred from recovery of dam-

ages for wrongful discharge. Hussey v. Holloway, 217 Mass. 100, 104 N.E. 471, 472; Squire v. Wright, 1 Mo.App. 172, 175; Ryan v. Mineral County High School Dist., 27 Colo.App. 63, 146 P. 792, 795; Dary v. The Caroline Miller, D.C.S.D.Ala., 36 F. 507, 509. An offer of re-employment may be couched in such terms as to save the rights of the employee, as where it is expressly understood that the employment will not cure the breach of the contract. Robinson v. Walker, 7 Cal.App.2d 268, 269, 46 P.2d 174.

[9] One who has been prevented from performing a contract of service should not be required to accept a new employment under cirumstances which permit the claim that he consents to a modification of the original contract and an abandonment of his right of action under it. Farmers' Co-Op. Ass'n v. Shaw, 171 Okl. 358, 42 P.2d 887, 889; Levy v. Tharrington, 178 Okl. 276, 62 P.2d 641, 642; Chisholm v. Preferred Bankers' Life Assur. Co., 112 Mich. 50, 70 N.W. 415, 417; People's Co-op. Ass'n v. Lloyd, 77 Ala. 387, 390.

[10, 11] In the instant action defendants' offer of re-employment was not coupled with any protective condition and was not made without prejudice to plaintiff's right of recovery under the original contract. Had she remained in defendants' employ and accepted their offer of $60 per week she would have been precluded from recovering any additional amount since such arrangement would have signified her consent either to a new contract or to a modification of the old one. In either case she would have waived and abandoned any right to claim under her former contract. Miller v. Abraham, 159 Ark. 493, 252 S.W. 15, 16; People's Co-op. Ass'n v. Lloyd, supra; Trawick v. Peoria & Ft. C. St. Ry. Co., 68 Ill.App. 156, 159; Whitmarsh v. Littlefield, 46 Hun, N.Y., 418, 420. A discharged employee is not required to accept re-employment from his employer if acceptance would sacrifice his right to claim damages to which he is entitled by reason of the violation of the contract by the employer. Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S.W. 242, 245; Hussey v. Holloway, supra; Wachs v. Friedmann, 11 Mo.App. 602.

[12] Since defendants' offer to continue plaintiff in their employ at a lower salary than that agreed upon was not so qualified as to preserve her rights under the contract and since if she had accepted the offer she would have modified her employment contract and waived any right to recovery thereunder, defendants are not entitled to the credit claimed.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissents.

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94 Cal.App.2d 525

STROTHER et al. v. PACIFIC GAS & ELECTRIC CO. et al. (two cases).

Civ. 7608, 7609.

District Court of Appeal, Third District, California.

Nov. 7, 1949.

Rehearing Denied Dec. 7, 1949.

Hearing Denied Jan. 4, 1950.

Separate actions by Dolly Elma Strother and others and by Clifford L. Strother against Pacific Gas & Electric Company and another for personal injuries and death and for property damages resulting from collision of an airplane with high power wires maintained by the corporate defendant on its own property adjacent to airfield, which actions were consolidated.

The Superior Court of Butte County, Harry Deirup, J., sustained demurrers to the complaints for failure to state facts sufficient to constitute a cause of action and on the plaintiffs' refusal to amend the actions were dismissed, and the plaintiffs appealed.

The District Court of Appeal, Thompson, J., affirmed the judgments.

1. Easements 🔑35

In action for personal injuries, death and property damage resulting from private airplane collision with high power wires near airfield, allegation that the airfield and the public had acquired prescriptive rights to the airlane over the adjoining property of the electric company was insufficient to show the existence of such prescriptive title.

2. Electricity 🔑15(1)

In action for personal injuries, death and property damage resulting from private airplane collision with high power wires near airfield, where no prescriptive title to airlane above the land of the electric company existed, the airplane at the time of the accident was trespassing on the property of the electric company, which owed no duty to operator or occupants of airplane to display signs or to warn them of the danger of the wires and poles which were erected and maintained on private property other than that of the airport.

3. Easements 🔑41

Operator of private airplane and occupants could not assert prescriptive rights to airlane across which high power wires were strung and maintained, since such space to an elevation of 26 feet above the ground was reasonably and beneficially used for the enjoyment of the owner's property rights.

4. Easements 🔑30(3)

Any prescriptive rights to airlane over property of electric company was subsequently abandoned and lost by the construction and use by the company of wires and poles on its land without opposition or interference for a period of more than five years. Civ.Code, § 811, subds. 3, 4.

5. Easements 🔑30(3)

When the claimant to adverse use of a right of way ceases to use it or abandons his claim of right and the owner of land to which it is incident occupies and uses it without objection for a period of five years or more, the effect of such discontinuance of use is just as conclusive against the adverse title thereto as though the claimant had been evicted by legal process. Civ. Code, § 811, subds. 3, 4.

6. Evidence 🔑47
Pleading 🔑6, 8(2)
Statutes 🔑281

Courts will take judicial notice of rules adopted by departments of the United States, but that does not obviate the necessity of affirmatively stating facts as distinguished from mere conclusions of the pleader regarding the effect of foreign statutes or other laws. Code Civ.Proc. § 1875, subd. 3.

7. Administrative law and procedure 🔑419
Electricity 🔑9(1)

A rule of the Federal Civil Aeronautics Administration requiring notice of intention to construct poles and wires near airport which did not become effective until November 1, 1941, had no application to poles and wires which had been constructed near airport some three years before the rule became effective.

8. Commerce 🔑16

In action for personal injuries, death and property damage resulting from private airplane collision with high power wires near airfield, where there was no allegation that the airfield or the plaintiffs were engaged in interstate traffic, the rules of the Federal Civil Aeronautics Administration did not apply.

9. States 🔑4.5

The police powers of the state were not surrendered to the federal government but were retained by the states to be exercised in all intrastate affairs.

10. States 🔑4.5

The regulation of the use of private property in intrastate transactions is vested exclusively in the legislative authority of the states.

11. Electricity 🔑19(2)
Negligence 🔑108(1)

In action for personal injuries, death and property damage resulting from private airplane collision with high power wires near airfield, allegation that the airfield was used by members of the general public as an airport for the landing and taking off of airplanes and for the ground maintenance thereof for a period of seventeen years prior to April 23, 1946, when the accident occurred, could not be construed as an adequate allegation that either the airfield or the plaintiffs were engaged in interstate air traffic.

12. Pleading ⚷8(2)

An allegation that airfield was under the supervision of the Civil Aeronautics Authority is a mere conclusion.

13. Commerce ⚷16

In action for personal injuries, death and property damage resulting from private airplane collision with high power wires near airfield, if the airfield or the plaintiffs were not engaged in interstate commerce or traffic, the rules of the Federal Civil Aeronautics Administration had no application.

14. Constitutional law ⚷81
United States ⚷5

The United States has sovereignty over the higher air space within its domain, and it may reasonably regulate air traffic therein regardless of whether it is interstate or intrastate traffic, but such sovereignty of the air does not authorize the federal government in the guise of police powers to interfere with the lower air space over a private owner's property, the use of which is intrastate and necessary and beneficial to the reasonable use of such property.

15. Electricity ⚷9(1)

The use of 26 feet of space above the ground for the construction and maintenance of high power wires and poles to be used in the business of a public utility which owned the land is a reasonable, beneficial and necessary use of the property.

16. Constitutional law ⚷81
States ⚷4.5

A proper and beneficial use of the air space above an owner's land may not be interfered with except for necessary police regulation in the interest and for the safety and protection of the public, and police power in intrastate air traffic is vested in the state and not in the federal government, except for benefit of Army and Navy airports and interstate air traffic under the commerce clause of the Constitution.

◆

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, and Goldstein, Barceloux & Goldstein, San Francisco, for appellants.

Robert H. Gerdes, W. R. Dunn and Richard H. Peterson, San Francisco, Grayson Price, J. M. McPherson and Charles H. Andrews, Chico, and Russell A. Harris, Sacramento, for respondents.

THOMPSON, Justice.

Plaintiffs have appealed from judgments, in two consolidated cases, which were rendered pursuant to orders sustaining general demurrers to the amended complaints with leave to amend the pleadings. The demurrers were sustained on the ground that the complaints fail to state facts sufficient to constitute causes of action. Plaintiffs refused to again amend their complaints and the actions were dismissed. The suits were brought to recover compensation for personal injuries, and for the death of a passenger and for property damages resulting from the collision of an airplane with high-power wires maintained by the defendant Pacific Gas and Electric Company on its own property adjacent to Patrick Air Field near Chico.

Each complaint is couched in six counts. The first complaint was filed by Dolly Elma Strother, the surviving wife of William Alexis Strother, a passenger in the airplane, who was killed, and the children of the spouses. The other complaint was filed by Clifford L. Strother, the operator of the private airplane which was involved in the accident. The Pacific Gas and Electric Company is charged with negligence in constructing and maintaining on its property near the airport the poles and high-power wires, contrary to the rules of the United States Civil Aeronautics Administration, and in failing to display signs or to give warning of the danger of said wires. The codefendant, Garrison Patrick, individually, as manager and operator of Patrick Air Field, as an executor of the estate of Bee Compton, deceased, owner of the air field, is likewise charged with negligence in failing to display signs or to warn plaintiffs or the patrons of the airport of the danger of said wires and poles.

The complaints allege that for more than seventeen years Patrick Air Field has maintained its air field in the vicinity of Chico 500 feet in width and 3,400 feet in length and extending southerly from a line parallel to Hagan Lane which is 45 feet north of the northern boundary of said air field; that during all of said time that airport has been commonly used by public and private airplanes as a landing field; that nine years subsequent to the establishment of said airport the defendant Pacific Gas and Electric Company constructed upon its easement and thereafter maintained a high-power system of electric wires and poles, parallel to the northern border of the field and about forty feet distant therefrom, consisting of "two wooden poles approximately 500 feet apart," upon which "Three electric high-tension wires" were strung "26 feet above the ground;" that both of said defendants knew of the dangerous proximity of said wires to the landing field, and that plaintiff, Clifford L. Strother, and other operators of airplanes were accustomed, for more than nine years, to fly in the airlane above the Pacific Gas and Electric Company's property in landing and departing from said field; that defendants failed and neglected to display signs or to use "safety measures of any kind" or to warn plaintiffs of said danger; that the Patrick Air Field and the public acquired prescriptive rights to the airlane over the adjoining property of the Pacific Gas and Electric Company. It was further alleged that plaintiff, Clifford L. Strother, who was operating his private airplane in which his father, William Alexis Strother, was riding as a passenger, in attempting to land, from a northerly direction in said airlane, at about 3 o'clock p. m. of April 23, 1946, collided with said high-power wires and crashed on the airfield as a result of which his father was killed, he was seriously injured, and his airplane was demolished. It was not alleged that the operator of the airplane was free from negligence, or that he had no knowledge of the presence of the wires.

[1-3] The complaints fail to state facts sufficient to constitute causes of action based on prescriptive title to the airlane above the land of the Pacific Gas and Electric Company, which space was beneficially used and occupied by the wires and poles of that public utility company. At the time of the accident plaintiff's airplane was trespassing on the property of the said defendant. The defendants owed no duty toward plaintiffs to display signs or to warn them of the danger of the wires and poles which were erected and maintained on private property, other than that of the airport. Nor may the appellants assert prescriptive rights to the airlane across which the high-power wires were strung and maintained, for that space to an elevation of 26 feet above the ground was reasonably and beneficially used for the enjoyment of that owner's property rights, and the plaintiffs were trespassers thereon at the time of the accident. Being trespassers, the owner of the land owed plaintiffs no duty to warn them of the hazard of the wires. Leslie v. City of Monterey, 139 Cal.App. 715, 34 P.2d 837; Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469; Capitol Airways, Inc., v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E.2d 776; Langazo v. San Joaquin Light & Power Corp., 32 Cal.App.2d 678, 689, 90 P.2d 825, 831. In the case last cited this court said: "'* * * A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. * * * The exemption of the landowner from liability as to trespassers * * * is necessary to secure him the beneficial use of his land; * *.'"

[4, 5] It appears from the pleadings that even though prescriptive rights to the airlane over the property of the Pacific Gas and Electric Company may have been acquired by adverse user of the space occupied by the wires, which is unnecessary for us to determine, that right of way was subsequently abandoned and lost by the construction and use by the owner of the wires and poles on its own land without opposition or interference for a period of more than five years. When the claimant

to the adverse use of a right of way ceases to use it or abandons his claim of right, and the owner of the land to which it is incident occupies and uses it without objection for a period of five years or more, the effect of such discontinuance of use is just as conclusive against the adverse title thereto as though the claimant had been evicted by legal process. The owner's possession and title to the easement is thereby restored. Civil Code, sec. 811, subds. 3 and 4; Glatts v. Henson, 31 Cal.2d 368, 188 P.2d 745; 2 Cal.Jur. 708, sec. 146; 17 Am.Jur. 1028, sec. 143. Section 811 of the Civil Code provides in part:

"A servitude is extinguished:

* * * * * *

"3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise: or,

"4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."

Assuming that the federal government has sovereignty of the air throughout its domain, above the elevation to which a property owner acquires necessary and beneficial use of his land, it is doubtful whether adverse possession or prescriptive rights in such public domain could be secured. 2 C.J.S., Adverse Possession § 12a, p. 524; Civil Code, sec. 1007. In the text found in 2 Corpus Juris Secundum, supra, supported by authorities, it is said: "* * * One may not acquire title to any part of the public domain by prescription or adverse possession."

We conclude that the complaints fail to state causes of action based on asserted prescriptive right to the airlane in question, and that the affirmative allegations of the complaints refute that claim.

[6] The appellants contend that the complaints allege negligence in constructing and maintaining the high-power wires and poles without notice to the Civil Aeronautics Administration, and without placing "markings and warnings" thereon, contrary to the rules adopted in 1938, "as amended * * * by 'Regulations and Standards for the Protection of Air Navigation—Obstruction Marking Manual of the United States Department of Commerce, Civil Aeronautics Administration, August 1, 1943." The pleadings do not quote or affirmatively state the rule relied upon, but allege as mere conclusions that the rules require "certain notices" of construction to be given and that warnings "must be placed thereon." We were furnished no copy of the rules, but have secured a copy of the manual referred to. While it is true that courts will take judicial notice of rules adopted by departments of the United States, C.C.P., sec. 1875, par. 3; Parker v. James Granger, Inc., 4 Cal.2d 668, 677, 52 P.2d 226, that does not obviate the necessity of affirmatively stating facts as distinguished from mere conclusions of the pleader regarding the effect of foreign statutes or other laws. 134 A.L.R. 574, note. In the headnote last referred to, which is supported by numerous authorities from various jurisdictions, it is said: "It is generally held that averring the pleader's conclusions as to the legal effect of the foreign statutory or other law, is an improper manner of pleading it. The pleader must state what the foreign law or statute provides in substance, and not his conclusion as to its legal effect, or what the rights of the parties are under it."

In Redwood Theatres, Inc., v. City of Modesto, 86 Cal.App.2d 907, 917, 196 P.2d 119, 125 (in which a hearing was denied), it is said the mere allegation of conclusions of law are an insufficient statement of ultimate facts, which are not waived by the filing of a demurrer. This court there said: "* * * The mere statements that the taxes imposed by ordinance number 772 are discriminatory, a double taxation, arbitrary, capricious or confiscatory, are merely conclusions of law. They do not constitute allegations of ultimate facts. Such conclusions are not admitted as facts by the filing of the demurrer. Meyer v. Board of Public Works, 51 Cal.App.2d 456, 470, 125 P.2d 50. In Pacific Railways Advertising Co. v. Conrad, 168 Cal. 91, 141 P. 916, 917, the Supreme Court said: 'It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a court may be invoked to right the wrong.' Such allegations must be adequately pleaded to constitute a good cause of action on those grounds." (See Callahan v. Broderick, 124 Cal. 80, 56 P. 782; Ede v. Cuneo, 126 Cal. 167, 58 P. 538.)

[7] With reference to appellants' claim that the defendants were negligent in failing to notify the United States Civil Aeronautics Administration of the Pacific Gas and Electric Company's intention to construct the poles and wires, assuming that said omission was properly pleaded, we are referred to no rule or law requiring that notice *which existed at the time the poles and wires were erected.* The complaints allege that the Patrick Air Field was established seventeen years prior to April 23, 1946, when the accident occurred, and that nine years later the poles and wires were erected. It therefore appears that the poles and wires were erected in April, 1938, eight years before the accident occurred. By reference to the Civil Aeronautics Administration Manual, upon which the appellants rely, which is dated "August 1, 1943," we find that Section 525.1, requiring notices to be given of the "construction or alteration of any structure" within a stated distance of airfields, under specified conditions, "shall become effective on November 1, 1941." That rule has no application to these cases because it did not become effective until some three years after the poles and wires were constructed.

[8] There was no allegation that the Patrick Air Field or the plaintiffs were engaged in interstate traffic, and therefore the federal rules, even if they were in effect at that time, would have no bearing on these cases. We are directed to no statute or rules in California which require notice or markings of monuments, poles or structures in the vicinity of airfields.

The United States statutes of 1926, to which reference is made, 44 U.S.Stats. 1925–1927, p. 570; 49 U.S.C.A. §§ 551 and and 671, do authorize the United States Civil Aeronautics Board to establish "air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft," but that act *contains no rules* for the giving of notice of the building of structures or the marking thereof. The first rules actually adopted by the federal government to that effect, to which our attention has been called, are contained in the Manual previously referred to, which is dated August 1, 1943, several years after the wires and poles complained of were erected. Those rules therefore have no application to these cases, and afford the appellants no relief.

Nor has the State of California adopted any such rules. Parker v. James Granger, Inc., supra; Stats. of 1929, p. 1874, amended Stats. of 1939, p. 1494, Gen.Laws, Act 151, Stats. of 1947, p. 2927, Gen.Laws, Act 151a. It is true that the last cited statute authorizes the California Commission to adopt rules consistent with the federal legislation governing aeronautics. But our attention has been called to the adoption of no such California rules, authorized by the statute. Moreover, Section 12(b) of the Act of 1947 provides that temporary rules may only be promulgated by the Commission, after public hearings and notice, and the adoption thereof by the Legislature.

[9, 10] It has been uniformly held that the police powers of the states were not surrendered to the federal government, but were retained by the states to be exercised in all intrastate affairs. 5 Cal.Jur. 689, sec. 103; 16 C.J.S., Constitutional Law, § 177, p. 545; 11 Am.Jur. 986, sec. 255. The regulation of the use of private property in intrastate transactions would appear to vest exclusively in the legislative authority of the states, as our Supreme Court said in the Parker case, supra.

It is true that paragraph III of the first counts of the complaints allege that "at all times mentioned said Patrick Air Field was approved by, and was under the supervision of, the Civil Aeronautics Authority." In support of that allegation we are supplied with a photographic copy of a list of airfields to which the Rules of the United States Civil Aeronautics Administration purport to apply, including therein "Chico (Patrick) 2 sse, 189." That list, which is dated November 1, 1946 (after the accident occurred) states that it applies to "the regulations of the Administrator of Civil Aeronautics, Part 525," and includes a requirement that "notice be given of certain construction or alteration of structures along or within 20 miles of a civil airway." It states nothing regarding the marking of "towers, poles, smokestacks and similar structures." But, with reference to the marking of such towers, poles, etc., we find, by reference to the "Obstruction Marking Manual", Part II, dated August 1, 1943, previously referred to, that the following federal rule was included: "Towers, poles, smokestacks and similar structures which present a hazard to air commerce should be painted throughout their height with alternate bands of international orange and white."

[11, 12] However, there is no allegation in the complaints in these cases that the Patrick Air Field or plaintiffs were engaged in interstate flights, traffic or service. All that the complaints allege with respect to the nature of the use of the field in question is that Patrick Air Field "was used by members of the general public as an airport for the landing and taking off of airplanes and for the ground maintenance thereof," for a period of "seventeen years" prior to April 23, 1946, when the accident occurred. Certainly that may not be construed as an adequate allegation that either the Patrick Air Field or plaintiffs were engaged in interstate air traffic. The statement that the Patrick Air Field "was under the supervision of the Civil Aeronautics Authority" is a mere conclusion. No facts are alleged which would confer upon the federal authority the right to regulate that airfield in California or adjacent properties of private owners in strictly intrastate transactions.

Under the pleadings, the federal rules have no application to these cases. That principle was determined in the Parker case, supra, in which the Supreme Court, under similar circumstances, said [4 Cal.2d 668, 52 P.2d 230]:

"During presentation of their cases plaintiffs offered in evidence a document issued by the Department of Commerce of the United States containing air commerce regulations relating to the licensing of aircraft and rules of air traffic. The court sustained an objection to its introduction into evidence made on the grounds that the same was incompetent, irrelevant, and immaterial. The ruling of the court was correct. * * *

"We have examined the regulations offered and find nothing therein of which the court was charged with judicial knowledge and which the court was called upon to declare to the jury. *The flight of the planes herein mentioned was intrastate, and under the Federal Constitution and the California Aircraft Act enacted in 1929 (St. 1929, p. 1874), the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights.* No such rules had been made by the Legislature when the accident herein occurred, and the conduct of the pilots and others involved in the accident would be measured and judged only under the general law and rules of negligence pertinent and applicable to the case." (Italics added.)

[13] On principle, the foregoing case is conclusive of the question as to whether the complaints in this case state facts constituting the alleged violation of the United States Civil Aeronautics Administration Manual of Rules. Such rules, if any existed at the time the accident occurred, are incompetent because there is no allegation that the Patrick Air Field or the plaintiffs were engaged in *interstate* commerce or traffic. If they were not so engaged then the federal rules have no application. The State of California would then have "exclusive power" to adopt and promulgate such rules and regulations, which it has never done. No California rules or legislation on that subject are pleaded or relied upon. Our attention is called to none in existence.

[14, 15] The appellants contend that the federal government has exclusive sovereignty of the air throughout the United States, its territories and possessions, and may exercise control of air traffic therein whether it consists of interstate or intrastate traffic. 99 A.L.R. 173; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 316; 2 C.J.S. Aerial Navigation § 3, p. 902. We concede that the United States has sovereignty over the higher airspace within its domain, and that it may reasonably regulate air traffic therein regardless of whether it is interstate or intrastate traffic. But that sovereignty of the air does not authorize the federal government, in the guise of police powers, to interfere with the lower airspace over a private owner's property, the use of which is intrastate and which is necessary and beneficial to the reasonable enjoyment of his land. Certainly, the use of 26 feet of space above the ground for the construction and maintenance of high-power wires and poles to be used in its business by a public utility corporation which owns the land, is a reasonable, beneficial and necessary use of the property. The regulation of such private property is vested in the Legislature of the State of California, as the Parker case, supra, states. Those police powers have never been transferred to the federal government. The regulation of all strictly intrastate business is retained by the State of California.

In Fixel on the Law of Aviation, 3rd Ed., p. 71, sec. 62, it is said:

"1. The ownership of a property right in airspace above a landowner's property, extends to the usable airspace above his property, * * *. The landowner is entitled to the use of such airspace as is necessary to the enjoyment of the use of the surface without interference by the flight or passage of aircraft.

* * * * * *

"7. An owner of land would have an action for trespass in cases where an airplane made physical contact with his land or any structure or person thereon, thereby causing damage, * * *."

In 1 Restatement of the Law of Torts, page 460, section 194, it is stated that the right of aircraft to invade the airspace above the land of another person is dependent upon the reasonable operation of such aircraft in such manner and "at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it." Under subdivision "g" of that section it is said: "Under the rule stated in this Section, only those flights are privileged which are conducted at such a height as not unreasonably to interfere with the possessory interest in the land. Thus, a flight, although otherwise conducted in a reasonable manner, for a legitimate purpose, and in conformity with all applicable local regulations, if conducted at such a low height as to cause reasonable fear or substantial annoyance to occupants of the land, * * * or to endanger the surface of the land, or persons, trees, *structures or other things thereon,* or to interfere with the possessor's legitimate use of the air space, is not within the privilege."

[16] Apparently the doctrine of limiting prescriptive rights to the beneficial use enjoyed by a landowner is applied to the use of the airspace above a property owner's land. It may be true that an unnecessary or improper use of the airspace above the owner's land may not secure to him a vested property right thereto. But a proper and beneficial use of the airspace above an owner's land may not be interfered with except for necessary police regulation in the interest and for the safety and protection of the public. That police power in intrastate air traffic is vested in the state and not in the government, except for the benefit of Army and Navy airports and interstate air traffic under the interstate commerce clause of the Constitution.

Regarding that federal supremacy of aviation within the states, territories and possessions of the United States, it is said in Fixel on the Law of Aviation, at page 20, that the Federal Air Commerce Act of 1926, 49 U.S.C.A. § 171 et seq., is accepted as the "law of the land, except as to such matters as are not covered by the Federal law, or which are secured to or granted to the several states." That text reads: "* * * The latter in general are such matters as come under the police powers of the states; or where in some instances, it is claimed by states that they have power and authority to regulate the navigation, registration and licensing of aircraft where such aircraft engage in pleasure or commercial flights solely within the boundaries of a state, or where, in case of an intrastate commercial flight, the aircraft does not transport articles of commerce as a part of a through carriage between points in different states."

We must assume the last-mentioned powers remain in the state.

Congress declared that the United States possesses sovereignty within the states and its possessions over the navigable "air space" therein. 49 U.S.C.A. § 176. The term "navigable airspace" is defined as that space which is "above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C.A., § 180. In the case of United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 1065, 90 L. Ed. 1206, upon which the appellants rely, it was held that repeated flights of government four-motored bombing planes over the poultry farm of Causby near an airport at Greensboro, North Carolina, at a height of 83 feet above the ground, frightening his chickens and causing the death of many of them, constituted a taking of property for which compensation for damages was due to the owner under the Fifth Amendment to the United States Constitution, which provides in part that no one shall be deprived of property without due process of law, "nor shall private property be taken for public use, without just compensation." The appellants in these cases contend that the Causby case is authority in support of their claim of prescriptive rights to the airlane acquired by flying over the property of the Pacific Gas and Electric Company. But title by prescription was not an issue in that case. It related only to the question of compensation for damaging the property of the owner by flying bombing planes over the property at such an altitude as to frighten his chickens and cause the death of many of them. The court said that, under the circumstances, "There would be a taking [of property] compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. * * * The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed." Compensation in that case was not awarded on the theory that a rule of the Civil Aeronoutics Authority had been violated. The court said in that regard: "The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. § 180, 49 U.S.C.A. § 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done."

Regarding the property owner's right to the enjoyment and control of that portion of the air above his property which is reasonably adaptable to the beneficial use of his property, the court further said in the Causby case: "We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. * * * The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."

The preceding language would certainly justify the construction of the wires and poles on the owner's land in the present cases. It is inconsistent with appellants' contention that they acquired prescriptive use of the airway over the owner's land.

The essential principles upon which the appellants in this case rely were determined adversely to them in the case of Capitol Airways, Inc., v. Indianapolis Power & Light Co., supra, in which the facts were similar to those of the present cases. The appellant, Capitol Airways, owned and operated a commercial airfield near Indianapolis. The appellee, Indianapolis Power & Light Company, a public utility corporation, acquired a right of way adjacent to and parallel with the airport, across a roadway, 100 to 250 feet from the boundary of the airport, and constructed thereon steel towers 90 feet in height and 400 feet apart, upon which it placed high-power wires carrying 132,000 volts of electricity. The airport company claimed that the towers and wires were highly dangerous to aircraft flying to and from that field, and that they constituted a taking of private property and would result in the destruction of their business. Suit for damages in the sum of $150,000 was commenced. A demurrer to the complaint was sustained. From the judgment which was accordingly rendered, the Capitol Airways appealed. On appeal the judgment was affirmed. It was determined that the Airways Company had no cause of action. The court held that the power company had a right to maintain the high-power wires and towers; that it owed no duty to protect the public against dangers that could not be reasonably anticipated, or to keep the property safe as against trespassers who might strike the wires in operating their airplanes in taking off or landing on the airfield. The court said [215 Ind. 462, 18 N.E. 778]:

"* * * If the statute requires more than common-law care, it is to be strictly construed against unlawfulness. Except for the proximity of the flying field, it would hardly be suggested that the wires on such a power line are so located that the general public is 'liable to come into contact with the wire or wires.' Members of the public might come into contact with the wires *by trespassing* upon the land and climbing the towers, but the statute is not for the protection of such.

"* * * 'Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' * * * *The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before.* Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. * * *

"* * * The appellee's power line interferes with none of the appellant's rights. It owes no duty to protect the public against dangers that cannot reasonably be anticipated. The owner of property is under no duty to keep the premises safe for a trespasser, who comes without enticement, allurement, or invitation." (Italics added.)

We conclude that the court properly sustained the demurrers to the complaints in the present cases. The complaints fail to state causes of action. The judgments are affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

94 Cal.App.2d 727

FANCHER v. BRUNGER.

Civ. 17365.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1949.

Action by Alma Fancher against Ruth E. Brunger, as executrix of the last will and testament of Emilie DeLonee, deceased, to recover reasonable value of services rendered by the plaintiff to the deceased.

The Superior Court of Los Angeles County, Percy Hight, J., rendered a judgment for $5,000 for the plaintiff, and the defendant appealed.

The Court, Drapeau, J., held that the evidence sustained the judgment and affirmed it.

1. Payment ⇨57

In a complaint upon obligation to pay money an allegation that the money has not been paid is required, on the theory that a failure to pay constitutes the breach of the contract sued on.

2. Pleading ⇨205(5)

Where the allegation of nonpayment of obligation sued on is in the form of a conclusion, or is of such a character that the fact of nonpayment is implied, it is sufficient when measured by general demurrer.

3. Pleading ⇨207, 208

Where allegation of nonpayment of obligation sued on is in the form of a conclusion, or is of such a character that the fact of nonpayment is implied, the attack must be made by special demurrer specially pointing out the defect, and in the absence of such a demurrer the defect is cured by judgment for the plaintiff.

4. Pleading ⇨34(3, 5)

Where action was founded on a claim presented to and rejected by the executrix of decedent's estate for services rendered upon an alleged promise made by decedent that plaintiff should receive proper reimbursement therefor from her estate, it was inherent in the promise itself that payment was not intended during the decedent's lifetime, and the fact of nonpayment could be implied from the allegation of promise to pay after death.

5. Executors and administrators ⇨221(5)

Evidence was sufficient to support a cause of action for the reasonable value of continuing services to decedent which were rendered with the expectation and understanding that they would be paid for out of the decedent's estate.

6. Executors and administrators ⇨205(1)

An expressed contract need not necessarily be proved in order to recover for services rendered to decedent, but it is sufficient if from the facts and circumstances it can be reasonably inferred that compensation was in the view and contemplation of the parties.

7. Work and labor ⇨4(1)

When services are rendered by one person from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a presumption of law which arises from proof of services rendered that the person enjoying the benefit thereof is bound to pay what they are reasonably worth.

8. Limitation of actions ⇨50(2)
Work and labor ⇨29(1)

Recovery may be had for the reasonable value of continuing services, and when payment is to be made at the death of the promisor the statute of limitations does not begin to run until the termination of the services by his death. Code Civ.Proc. § 339.

9. Appeal and error ⇨193(1)

Where claim against executrix and petition were sufficient to apprise the executrix of the general nature of the claim and the cause of action upon which the plaintiff would be entitled to rely, and the evidence was sufficient to support the cause of action for the reasonable value of continuing services, it was too late on appeal for the executrix to object to any formal deficiencies in the claim or in the statement of the cause of action.

10. Trial ⇨395(1)

Findings of fact which determined the truth or falsity of every material allegation and thereby disposed of the issues presented for determination were sufficient, though they were not model findings.

11. Work and labor ⇨4(2)

The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation for services rendered, as well as from direct communications between the parties, and the expectation of compensation may co-exist with higher motives prompted by affection or sense of duty, and the existence of the latter does not necessarily exclude the idea of pecuniary compensation.

12. Work and labor ⚷4(2)

To warrant the finding of a contract to pay for services rendered, the elements of intention to pay on the one hand, and the expectation of compensation on the other, must be found to exist, but such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may be reasonably said to throw any light on the question at issue.

◆

Eugene Tincher, Long Beach, for appellant.

Mary Swift Beeks, Long Beach, for respondent.

DRAPEAU, Justice.

After her claim therefor had been rejected, plaintiff brought this action against defendant as Executrix of the Last Will and Testament of Emilie DeLonee, deceased, to recover the sum of $5,000, alleged to be the reasonable value of services rendered by plaintiff to the deceased at the latter's special instance and request. It is also alleged in the complaint that for the services described therein and other similar services decedent "informed Plaintiff on more than one occasion that she would receive proper reimbursement from her estate."

According to the complaint, the services were rendered continuously from August 28, 1938, to date of death on May 31, 1948. The rejected claim was attached to the complaint and made a part thereof by reference.

The answer admitted the presentation of the claim and its rejection; denied generally the rendition of the services and their alleged value, and set up the defense of the statute of limitations.

The cause went to trial upon these issues, in particular that the alleged services were never rendered. The court found in favor of plaintiff for the sum prayed for. From the judgment which followed, defendant executrix appeals.

It appears from the record that in 1938, when decedent was in the seventies and fairly active, she and respondent were neighbors living in close proximity to each other; and if respondent did not see decedent by nine o'clock every morning, she went over to find out "if she was up and around." During the period from 1938 to the date of death, respondent looked after decedent: dressed her, straightened up her house for her, made sure the dishes were clean and that there was food in the house; read her letters to her, wrote business letters for her and attended to her business affairs; helped her with her building and loan deposit book; made sure she did not tear up checks when they came through the mail; took her to the bank to draw interest, so she would have enough to live on; purchased and prepared food and took it to decedent; did her laundry, made her dresses, and performed the duties of a practical nurse during the last two years of decedent's life. Early in 1946 when decedent was old and feeble, she fell and injured her leg; in the fall of that year, she fell and broke her right arm and respondent took her to the doctor, and from that time until decedent died took care of her as a nurse. Mrs. Woodruff, respondent's daughter, testified to the above facts, and also that her mother made a dress for decedent about six years before she died at which time decedent stated that it was just what she wanted, but that respondent "would have to wait until after she was dead to get her pay for doing that as well as all of the other things mama had done"; that in 1942, decedent stated that "when she died Mrs. Brunger would be the administrator of the Estate, and mother and her would get half and half because she had made provision for the Marshs', because she had given Dorothy a lot in North Long Beach and various sums of money at different times."

Mrs. Fahrney, who had known decedent and respondent from the time she moved into the neighborhood in 1940, testified that in the fall of 1946, Mrs. DeLonee told her that "Alma (respondent) will have to wait * * * until I am gone.

I have provided for her $10,000 in my Will; that will pay her for all the services she has given me."

Mrs. Jones, another neighbor who lived next door to Mrs. DeLonee from 1940 to 1948, testified that Mrs. DeLonee told her she thought a lot of respondent and "that she was taking care of her when she was laid away." Also, that she often ran into Mrs. DeLonee's house to see how she felt and if there was anything she could do for her; that Mrs. DeLonee "would say, 'No, Mrs. Fancher would take care of it.'"

The evidence offered by appellant was mainly testimony of the beneficiaries under decedent's will to the effect that she was a very spry old lady, who kept her own house and declined help when it was offered; that prior to 1946, she visited them frequently at their homes in Long Beach, and that they often called on her at her home, usually staying an hour or two; that they never saw respondent in decedent's house, but that it was she who notified them of decedent's illness in 1946. Also that they offered "to do things" for Mrs. DeLonee, but "she didn't want anyone to do anything for her."

So far as is shown by the record, the parties hereto and the witnesses at the trial were all friends of decedent, but none was related to her.

Appellant contends first that the complaint does not state facts sufficient to constitute a cause of action, to-wit: it does not allege nonpayment of the obligation sued upon, and is therefore fatally defective.

[1] It is established law that "In a complaint upon obligation to pay money an allegation that the money has not been paid is required, on the theory that a failure to pay constitutes the breach of the contract sued on." 20 Cal.Jur. 945 and cases there cited. See also, Lloyd v. Kleefisch, 48 Cal.App.2d 408, 416, 120 P.2d 97.

[2, 3] However, the courts have upheld various modes of alleging nonpayment other than by direct averment. As stated in 20 Cal.Jur. 948: "Where the allegation of nonpayment, though defective, is in the form of a conclusion, *or is of such a character that the fact of nonpayment is implied,* it is sufficient when measured by general demurrer; in such case the attack must be made by special demurrer specifically pointing out the defect (Grant v. Sheerin, 84 Cal. 197 [23 P. 1094]; Poetker v. Lowry, 25 Cal.App. 616 [144 P. 981]; Burke v. Dittus, 8 Cal.App. 175 [96 P. 330]), and in the absence of such a demurrer the defect is cured * * * by judgment for the plaintiff (Penrose v. Winter, 135 Cal. 289 [67 P. 772])."

Appellant demurred generally to the introduction of further testimony during the course of the trial, but the specific ground therefor was not stated.

[4] As heretofore stated, this action is founded upon a claim presented to and rejected by the executrix of decedent's estate for services rendered upon an alleged promise made by decedent in her lifetime that respondent should receive proper reimbursement therefor from her estate. It is inherent in the promise itself that payment was not intended during the lifetime of Mrs. DeLonee; therefore, the fact of nonpayment may be implied from the allegation of the promise to pay after death.

Appellant next urges that the evidence is not sufficient to establish an express contract between respondent and the decedent.

[5-7] The holding in Lloyd v. Kleefisch, 48 Cal.App.2d 408, 411, 120 P.2d 97, 99, is applicable to the instant cause, to-wit: "There can be no doubt that the evidence offered and the reasonable inferences therefrom support the implied finding of the jury that these services were rendered with the expectation and understanding that they would be paid for. In a case closely parallel to the instant one on its facts, the court in Seib v. Mitchell, 10 Cal.App.2d 91, at page 94, 52 P.2d 281 [at page 282], stated: 'An express contract need not necessarily be proved, but "it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties." Mayborne v. Citizens' Trust & Sav. Bank, 46 Cal.App. 178, 188 P. 1034, supra. When services

are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth." Moulin v. Columbet, 22 Cal. 508, 509.'"

It is also argued that recovery for services rendered more than two years prior to date of death is barred by the statute of limitations, section 339, Code of Civil Procedure.

It should be noted that the trial herein was had upon the theory that respondent had stated a cause of action for the reasonable value of continuing services performed by her at the special instance and request of decedent, which were to be paid for at the termination of the services, i. e., at the death of decedent, for which payment was not furnished nor provided.

[8] "That recovery may be had for the reasonable value of such continuing services, as distinguished from the contract price therefor, and that when payment is to be made at the death of the promisor the statute of limitations does not begin to run until the termination of the services by his death, is well settled in this state. Long v. Rumsey, 12 Cal.2d 334, at 342, 84 P.2d 146, with cases cited; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562." Reeves v. Vallow, 16 Cal.2d 95, 97, 104 P.2d 1017, 1018.

[9] Appellant next contends that the evidence does not support the allegations of the complaint as amplified by the bill of particulars. Apropos of this contention, the following appears in Reeves v. Vallow, supra, 16 Cal.2d 95, 98, 104 P.2d 1017, 1018: "If the evidence is sufficient to support the cause of action for the reasonable value of the continuing services, it is now too late for the defendant to object to any formal deficiencies in the claim or in the statement of the cause of action. Both were sufficient to apprise the administrator of the general nature of the claim and the cause of action upon which the plaintiff would be entitled to rely under the foregoing authorities. Syler v. Katzer, 12 Cal.2d 348, 84 P.2d 137, 119 A.L.R. 422; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84."

The evidence adduced at the instant trial, as hereinabove recited, was amply sufficient to support a cause of action for the reasonable value of continuing services.

[10] With respect to appellant's argument that the findings of fact are too general and are not responsive to the issues raised, it must be admitted that they are not "model" findings. However, they do determine the truth or falsity of every material allegation and thereby dispose of the issues presented for determination.

[11-12] There is no merit in the last two propositions urged by appellant. Suffice to say, quoting from Winder v. Winder, 18 Cal.2d 123, 127, 114 P.2d 347, 350, 144 A.L.R. 935: "It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing (Code Civ. Proc., § 1973; Civ.Code, § 1624), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. (Citation of authorities.) The relationship between the parties may repel the idea of contract (Murdock v. Murdock, 7 Cal. 511; Briggs v. Estate of Briggs, 46 Vt. 571, 577), and in order to support a claim for services made by a child or relation who remains with his parent or kin after majority the circumstances must show either an express contract or that compensation was in the contemplation of the parties. (Citation of authorities.) In the case last cited [Wainwright Trust Co. v. Kinder, 69 Ind.App. 88, 120 N.E. 419 [420] it was said: 'The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. * * * [The] expectation of

compensation may co-exist with higher motives prompted by affection or the sense of duty, and * * * the existence of the latter does not necessarily exclude the idea of pecuniary compensation. * * * To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, like other ultimate facts, mays be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.' "

There was no evidence presented which would remotely support an inference that the services rendered by respondent were intended to be gratuitous.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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94 Cal.App.2d 310

BRADLEY v. BRADLEY.

Civ. 13960.

District Court of Appeal, First District,
Division 2, California.
Nov. 26, 1949.

On petition for rehearing.

Petition denied by the District Court of Appeal, Goodell, Acting P. J., on the ground that insufficiency of the evidence to support particular finding could not be questioned for the first time on rehearing.

Prior opinion 210 P.2d 537.

1. Appeal and error 🔑832(4)

Claimed insufficiency of evidence as matter of law to support finding of extreme cruelty could not be raised for first time on petition for rehearing.

2. Appeal and error 🔑832(4)

Appellate courts cannot submit to piecemeal argument and will not consider on petition for rehearing questions not previously raised.

J. Elwood Andresen, Oakland, for appellant.

Francis P. Healey, Richmond, for respondent.

GOODELL, Acting Presiding Justice.

The only matters urged on this appeal were those decided by this court in the opinion previously filed. We quote from page 3 of appellant's opening brief: "Two questions arise from the evidence as follows: 1. Condonation, and 2. the sufficiency of corroboration of plaintiff's testimony." On petition for rehearing appellant attempts to raise for the first time a third point, the claimed insufficiency of the evidence as a matter of law to support a finding of extreme cruelty.

This latter question is presented too late. Appellate courts cannot submit to piecemeal argument and will not consider on petition for rehearing questions not previously raised. Pasadena Ice Co. v. Reeder, 206 Cal. 697, 705, 275 P. 944, 276 P. 995; Merchants' Ice & Cold Storage Co. v. Globe Brewing Co., 73 Cal.App.2d 828, 838, 167 P.2d 503; 2 Cal.Jur. 790–792.

Rehearing denied.

94 Cal.App.2d 743

BERILLA v. POPE et al.

Civ. 17051.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1949.

Louise Hoeschen Berilla brought action against Hugh O. Pope, Helen M. Pope and James L. Sampsell.

The Supreme Court of Los Angeles County, Stanley N. Barnes, J., rendered an order denying the motion of James L. Sampsell to vacate a default judgment entered against him, and for permission to file an answer to the complaint, and he appealed.

The District Court of Appeal, McComb, J., affirmed the order, holding that period during which defendant was absent from the state did not toll the limitation period, and that defendant's motion came too late.

1. Judgment ⚷386(1)

Period during which defendant was absent from the state did not toll the six-month period of statute limiting time in which a court may grant relief from an order or judgment taken against a party through his mistake, inadvertence, suprise or excusable neglect. Code Civ. Proc. § 473.

2. Judgment ⚷153(1)

Where entry of defendant's default and judgment predicated thereon were made and entered several years before motion was made by defendant to vacate the judgment, motion came too late, and was properly denied. Code Civ.Proc. § 473.

James S. Jarret, Los Angeles, for respondent.

Walter Gould Lincoln, Los Angeles, for appellant.

McCOMB, Justice.

From an order denying a motion of defendant Sampsell, (1) to vacate and set aside a judgment theretofore entered against him, and (2) for permission to file an answer to the complaint, said defendant appeals.

Facts: The default of defendant Sampsell was entered October 2, 1942, of which fact he and his counsel were apprised on September 17, 1943. On July 5, 1945, a default judgment was entered against him. He took no action to set aside the default until August 8, 1947, when he filed a notice of motion for dismissal of the action because it had not been brought to trial within five years. This motion was denied August 14, 1947. On February 21, 1948, a motion was made to set aside the default judgment, which was denied March 2, 1948. On September 16, 1948, he filed the present motion which was denied October 29, 1948. Defendant was absent from the state for a considerable period of time after his default had been entered.

Question: *Did the period that defendant was absent from the state toll the six month period provided in section 473, Code of Civil Procedure, limiting the time in which a court may grant relief from an order or judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect?*

[1] This question must be answered in the negative. It is obvious that it would be unjust to permit a defendant who had been duly served with process in this state to prevent plaintiff from taking further proceedings against him by simply absenting himself from the jurisdiction of the court. Section 473, Code of Civil Procedure, means exactly what it says: that an application for relief pursuant to its provisions "must be made within a reasonable time, in no case exceeding six months, after such judgment, order" or other proceeding has been taken. Cf. Smith v. Jones, 174 Cal. 513, 516, 160 P. 890, 891; Barnett v. Reynolds, 124 Cal.App. 750, 751, 13 P.2d 514.

Authorities Relied on by Defendant: Timmons v. Coonley, 39 Cal.App. 35, 36, 179 P. 429, is not applicable to the present case for in the cited case the appeal was directly from a default judgment and the trial court held that the default had been erroneously entered. Potts v. Whitson, 52 Cal.App.2d 199, 125 P.2d 947, 952, is likewise inapplicable. In such case the motion to set aside the judgment was made less than six months after its entry, and the court held the entry of the default "was wholly void and subject to expungement at any time." Clearly this case is factually distinguishable from the present one. Bartell v. Johnson, 60 Cal.App.2d 432, 140 P. 2d 878, and Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3, are not applicable to the facts in the present case for the reason that in each of these cases there was instituted an independent action in equity to set aside a previous decree on the ground of a mistake of fact. These cases are likewise factually distinguishable from the instant one.

[2] Since the entry of defendant's default and the judgment predicated thereon were made and entered several years before the present motion was made, the motion came entirely too late and was properly denied.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

COLUMBIA OUTFITTING CO. v. FREEMAN.

Civ. 14095.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1949.

Hearing Granted Jan. 19, 1950.*

The Columbia Outfitting Company sued B. H. Freeman, a collection agent, on a common count alleging failure to remit, wherein defendant cross-claimed under terms of his collection contract.

The Superior Court, in and for the City and County of San Francisoc, Ben. R. Ragain, J., rendered a judgment for plaintiff, and defendant appealed.

The District Court of Appeal, Peters, P. J., reversed the judgment, and held that plaintiff's credit manager had ostensible authority to enter into the collection contract, that defendant was guilty of no fraud or breach of contract, and that the contract was not unconscionable and contained no unenforceable provision for a penalty.

1. Principal and agent 🔑99

An agent has "ostensible authority" when third person believes that agent has authority, and such belief is generated by some act or neglect of the person to be held. Civ.Code, §§ 2315–2319.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ostensible Authority".

2. Principal and agent 🔑116(1)

Where an agent has authority, any undisclosed limitation of that authority which would prevent agent from contracting with third parties for that purpose is a secret limitation, and does not release principal from liability.

3. Principal and agent 🔑116(1)

Where special character of agency is not known, and principal has clothed agent with apparent powers, strangers in dealing with agent may assume that such apparent powers are possessed, and principal cannot by private communication with agent limit authority which he allows agent to assume.

4. Corporations 🔑399(4)

Where general manager knew agent had been collecting accounts for corporation for eight years and had transacted all business through credit manager who had authority to give assignments, and general manager gave credit manager express authority to recall delinquent accounts and to make agent sole collection agent, credit manager had "ostensible authority" to enter into contract under which collection agent took one-half of all sums collected, and corporation was bound although amount was in excess of what general manager believed was reasonable. Civ.Code, §§ 2315–2319.

5. Appeal and error 🔑854(1)

If a judgment may be sustained on any theory, it must be affirmed.

6. Principal and agent 🔑81(4)

Where collection agent agreed to draft agreement he wanted from principal for admitted reason that he wanted to protect himself against recall of accounts, and agent consulted his attorneys without notifying principal, and after preparing contract, agent read it to principal's manager over the telephone and sent him copies by mail, and principal's manager had time and opportunity to consult his superiors or principal's lawyers but did not do so, principal could not avoid contract on ground of fraud.

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* Subsequent opinion 223 P.2d 21.

7. Contracts ⚿53

Normally, adequacy of consideration of a contract, in absence of fraud, duress or mistake, cannot be inquired into in an action at law even though contract terms may be harsh.

8. Contracts ⚿1

Where contract is one in which no man in his senses and not under delusion would make on one hand, and which no honest and fair man would accept on the other, court will not enforce it.

9. Corporations ⚿456

Where collection agent and corporation had years of experience in problems growing out of collection of delinquent accounts, contract signed by credit manager permitting agent to retain one-half of principal on recall of accounts by corporation could not be avoided on ground of inadequacy of consideration.

10. Corporations ⚿456

Where collection agent's contract permitted him to retain full commission of 50 per cent of principal sum to be collected upon recall of accounts by corporation, but agent was otherwise required to handle all accounts of the corporation, and credit manager demanded in writing return of all accounts on which suit had not been filed and agent complied, agent was not required to reaccept the accounts.

11. Contracts ⚿172

Where provision of contract is in fact or in law a penalty, fact that provision is couched in terms of an option does not prevent its being interpreted as a penalty. Civ.Code, § 1670.

12. Corporations ⚿456

Where contract between corporation and collection agent requiring agent to handle all accounts provided that corporation could recall all accounts but that agent would then be entitled to one-half of principal amounts, recall provision was not a "penalty" and was enforceable. Civ.Code, § 1670.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Penalty".

13. Contracts ⚿176(1)

Where there is no evidence as to parties' intent, construction of a contract is not a question of fact, but is one of law.

14. Corporations ⚿456

Under collection agent's contract giving corporation power to recall any or all accounts which may have been assigned, and entitling agent in that event to receive all costs advanced in working them plus full commission on principal sum due, corporation had right to recall any accounts transferred whether any sum had been collected by suit or otherwise, but in that event corporation was required to pay full commission on all accounts not regarded as uncollectible.

◆

Oscar Samuels, Tevis Jacobs, San Francisco (Robert Sills, San Francisco, of counsel), for plaintiff and respondent.

Alden Ames, Sanborn H. Smith, Abraham Glicksberg, San Francisco, for defendant and appellant.

PETERS, Presiding Justice.

Columbia Outfitting Company brought an action against B. H. Freeman, doing business as Freeman Adjustment Bureau, a duly state licensed collection agency, for $1,927,18 on a common count, it being claimed that Freeman had collected that amount for Columbia and failed to remit. Freeman answered and, in addition, cross-complained, admitting he had in his possession $1,849.72 belonging to Columbia, but claiming that Columbia owed him $69,761.63 under the terms of a pleaded contract. He prayed for judgment in the amount of the difference—$67,911.91. The parties stipulated at the trial that the amount retained by Freeman was $1,849.72, less $549.34 which had been expended by him. Judgment was entered in favor of Columbia in the amount of $1,300.38 and against Freeman on his cross-complaint. From that judgment Freeman appeals.

Facts.

Columbia is a corporation. It operates a retail store in San Francisco. Freeman, as one of four or five collection agents, has been collecting delinquent accounts for Columbia since 1938. From 1938, until May of 1946, Freeman operated under oral agreements made with the successive credit managers of Columbia under which he advanced all costs and expenses, and, after collection, he remitted to Columbia 50% of the principal collected, he keeping the balance.

Columbia sold a large amount of merchandise on time contracts. These were evidenced by contracts printed on cards kept in numerical order by Columbia, and signed by the customers and guarantors. These contracts provided that the customer or guarantors waived the statute of limitations, and, in the event suit was necessary to collect, agreed to pay interest, costs of collection and an attorney's fee.

The accounts turned over to the collection agencies by Columbia ranged from several months old to as much as twenty years old. Freeman, both before and after May of 1946, handled his assignments as follows: He would first eliminate those accounts incapable of collection because of bankruptcy of the debtor, or his death, or because the amount involved was so small that further action was impracticable. The retained cards he would arrange in alphabetical order, and he would then attempt to trace the customer and guarantors. For this purpose he used city and telephone directories, records of the Motor Vehicle Department, tax and assessment rolls, judgment books and other media. Each account was put through this process. If the debtor was found, investigation was then made as to whether further action was feasible, and particularly as to whether he had any attachable property. Freeman would then attempt to collect by sending letters to the debtor, and, if this failed, he would turn the case over to one of his attorneys for the filing of the appropriate action. In order to maintain these actions, an assignment of the contract in question from Columbia to Freeman was frequently made. These assignments were quite uniformly signed by the credit manager of Columbia. Admittedly, Freeman was much more successful in making collections than were the other agents used by Columbia.

In 1946, S. W. Portner was the general manager and a member of the board of directors of Columbia. He had worked for the company in various capacities for a period of ten years, and had been appointed general manager in June of 1945. He was thoroughly familiar with the arrangements made by the various credit managers to collect delinquent accounts. In March of 1946, he hired, on behalf of Columbia, Edward Flottemesch, as credit manager. The principal problem involved on this appeal revolves around the question as to the extent of Flottemesch's authority—actual, implied, or ostensible. Admittedly, it was within his powers to transfer accounts to collection agencies, and, where necessary, to sign assignments. Admittedly, the various collection agents, including Freeman, dealt almost exclusively with the credit manager, and admittedly, during the crucial negotiations about to be described, Freeman dealt exclusively with Flottemesch.

When Flottemesch became credit manager he found considerable difficulty in ascertaining the status of the delinquent accounts in the hands of the various collection agents. He asked for and secured from Portner, authority to call in all accounts from the various collection agents. Under date of March 28, 1946, he addressed a letter to Freeman (similar letters were sent to the other agents) making formal demand upon him "to return all claims placed with you by our company for collection and to render an accounting of all money and property of value received by you which has not already been paid over." The letter also contained the following sentence: "As the new credit manager for the Columbia Outfitting Company, I am endeavoring to analyze the condition of all accounts and to institute a new method of handling all delinquent accounts." Flottemesch signed this letter and admittedly he had express authority from Portner to send it. At that time Freeman had in his possession about 800 Columbia accounts. At that time Columbia was not the only client of Freeman. He collected accounts for other clients.

Before Freeman had returned the contracts and the requested accounting, Flottemesch determined that Freeman, in the past, had rendered more efficient service to Columbia than had the other agents, and determined that it would be in the best interests of Columbia if all delinquent accounts were turned over to Freeman for collection. Portner admitted that he granted express authority to Flottemesch to take such action. Flottemesch then approached Freeman with such a proposal. Freeman pointed out to the credit manager that if he took over all of Columbia's accounts he would be forced to devote all of his time to Columbia to the exclusion of his other clients, that he would have to invest a large sum of money in investigations, and that Columbia might recall the accounts, as they had just done, after work had been done upon them. He, therefore, told Flottemesch that he would not proceed without the protection of a written contract. Flottemesch agreed that such suggestion was fair. Freeman then suggested that he would make a rough draft of a proposed contract and submit it to Flottemesch. The credit manager agreed to this procedure. Freeman returned to his office, consulted with his attorneys, and then prepared a proposed contract. The proposed agreement was in the form of a letter addressed to Freeman and intended to be signed by Flottemesch. Freeman telephoned to Flottemesch and read him the proposal over the phone. Flottemesch agreed that the proposal was fair, and suggested that Freeman have the letter typed on Columbia stationery, which he agreed to furnish. Freeman had the letter so prepared and sent the original and a copy to Flottemesch. The latter signed the original as "Credit Manager, Columbia Outfitting Co.," and returned it to Freeman, keeping a copy which he apparently kept in his desk. This is the letter that is the basis of Freeman's cross-complaint. It reads as follows:

"May 9, 1946

"B. H. Freeman
"512 Flood Building
"San Francisco, California
"Dear Mr. Freeman:

"This is to confirm our oral agreement heretofore had with you with respect to all accounts [that] have been previously assigned to you for collection and which may hereafter be assigned to you for collection.

"You are to have the exclusive right to work said accounts and to enforce payment of same by suit or otherwise, and for your services to us you are to receive and retain all sums save fifty per cent of the unpaid principal which you will remit to us. You may retain any and all interest and the mentioned fifty per cent of the unpaid principal sum collected on said account or accounts; all costs of suit or otherwise are to be advanced by you and said costs to be returned to you from the first moneys collected on said account or accounts.

"It is expressly understood that we have the right at any time to recall, in writing, any or all of the said accounts which we may have heretofore assigned to you, or which we may hereafter assign to you, and in that event you are to receive from us all costs which you may have advanced in working said recalled account or accounts, and also your full commission on the principal sum due on said recalled account or accounts.

"It is further understood that you will render to us a statement on all accounts already assigned and to be assigned in the future, periodically as you have in the past.

"Trust the above meet[s] with your approval and looking forward to your keeping up your good work, we are

"Yours, very truly,
"Edward Flottemesch
"Credit Manager, Columbia
Outfitting Co."

Freeman testified that he discussed the second paragraph with Flottemesch. The latter was not clear on this subject. Flottemsch was not certain whether he had consulted Portner before signing the contract. Portner testified that he knew nothing at all about the contract until after Flottemesch left the employ of Columbia in May of 1947. In view of the findings, these conflicts must be resolved in favor of Columbia.

After the contract was executed, Freeman testified that he examined about 25,000 delinquent accounts in Columbia's files and came to the conclusion that about 8,000 were possible of collection. Columbia witnesses estimated that the original number in their files did not exceed 8,000. This conflict, too, must be resolved against Freeman. There is no dispute that he "processed" about 8,000 contracts, and returned several thousand to Columbia as uncollectible. On all the contracts retained by him he did some work, which, in the aggregate, amounted to a great deal of work. Between May, 1946, and April, 1947, Freeman had his attorneys file actions on about 1,000 of the accounts, and during that period he remitted to Columbia, as its share of his collections, on an average of $320 per month. By March of 1947, Freeman had completely processed more of the accounts and was prepared to file suit in about 1,000 more cases, as soon as his attorneys could handle the load.

In March, 1947, Portner became dissatisfied with some of the more aggressive methods employed by Freeman. Portner was particularly annoyed by the publicity given a mandamus action brought by Freeman against a judge of the Municipal Court who had refused to enter default judgments against delinquent debtors on the ground that the waiver of the statute of limitations was void. It should be here pointed out that Freeman was correct in his legal position in that case and ultimately prevailed, and that Flottemesch approved the bringing of the action. Portner had several conversations with Freeman on this subject, and when Freeman refused to drop the mandamus action, Portner determined to take other action. Under date of March 18, 1947, he wrote to Freeman expressing displeasure about the filing of the mandamus action and directing him to stop that action immediately. The letter contains this language:

"2. You are to continue the collection of those accounts you have begun * * *

"3. You return to us the balance of those accounts which you have in your possession.

"4. You give us an accounting of everything to date.

"We regret that this action had to be taken, but inasmuch as you stated that the only methods you would continue are these, which we feel are too aggressive, we have no other alternative.

"This action is not to be construed in any way as a criticism of your work or of your integrity. As a collection agency you have done an excellent job. But we still feel that the methods are possibly too aggressive for us.

"Thanking you for your past services, we are,

"Very truly yours,
"The Columbia
"S. W. Portner."

Freeman immediately, in writing and orally, asked Portner for a more detailed explanation of this request. More particularly he asked Portner at what stage a collection should be regarded as "begun." Portner claimed that his letter was self-explanatory and refused any further clarification. Freeman discussed the March 18th letter with Flottemesch, and Flottemesch, discussed the matter with Portner. Freeman demanded that Columbia clearly indicate what accounts were being recalled. Flottemesch, under date of March 24, 1947, wrote to Freeman as follows:

"In answer to your letter of March 21 and in clarifying Mr. Portner's letter of March 18, you are to keep all accounts that suit has been filed upon and return all others.

"Very truly yours.
"Columbia
[Signed] "E. Flottemesch
"Credit Manager"

Based upon these requests, Freeman retained only those accounts on which suit had actually been filed, and returned to Columbia 3609 accounts, the remaining Columbia accounts in his files. The returned accounts aggregated in amount $138,188.60. Subsequently, Freeman made formal demand for one-half of this amount plus costs expended, or $69,761.63. The lawyers for Columbia then wrote to Freeman refusing to recognize his claimed contract rights, but tendering back to him all of the returned accounts that were in the process of collection. Freeman refused the tender. Columbia then brought suit for one-half the amounts of principal collected by Freeman and not remitted, and Freeman cross-complained for the amount claimed by him, less what he admittedly owed Columbia. The case was tried on the cross-complaint, resulting in a judgment on all issues for Columbia.

Findings of Fact and Conclusions of Law

The findings and conclusions are most detailed, and cover practically every phase of the evidence. The court concluded that Flottemesch had no authority, express, implied or ostensible, to enter into the challenged contract; that the contract was never ratified by Columbia; that Freeman was guilty of fraudulent conduct in procuring the contract; that the contract does not require Columbia to pay sums to Freeman on the recalled accounts other than costs expended by him; that should the contract be construed as requiring payments of one-half the principal, it is unconscionable and therefore unenforceable; that if it be so construed, the provision constitutes a penalty and is unenforceable; that Freeman did not perform the implied covenant of the contract that he should attempt to collect all accounts assigned to him and collectible, but returned to Columbia all accounts on which suit had not been filed although some of the accounts were in the process of collection; and that Freeman violated the contract in refusing to accept the accounts tendered to him by the attorneys for Columbia.

Did Flottemesch have authority to enter into the Contract?

The basic problem in this case revolves around the question as to whether Flottemesch had express, implied or ostensible authority to enter into the contract of May 9, 1946. The basic finding supporting the conclusion that no such authority existed reads as follows: "That at the time of his conversation with Flottemesch and the preparation of said letter by him Freeman was well aware that Portner was the General Manager of Columbia, and that Flottemesch had been but recently employed by Columbia. That Freeman had no prior dealings with Flottemesch and did not investigate the authority of Flottemesch; that he did not contact Portner or any officer of Columbia; that Flottemesch was not given express authority by Columbia to execute any contracts on behalf of Columbia nor did his duties as Credit Manager of Columbia authorize him to execute any contract on behalf of Columbia and that Flottemesch was not given express authority by Columbia nor did his said duties of Credit Manager authorize him to assign any delinquent accounts of Columbia to Freeman on any basis other than that theretofore existing; that Flottemesch was given a desk in the general office of Columbia in which office were also located the stenographers and cashier and he was not held out by Columbia as having such authority. That Flottemesch did not at any time advise Portner nor any other officer of Columbia of the existence of said letter of May 9, 1946, nor did he place the same in any file of Columbia, and neither Portner nor any other officer of Columbia ascertained the existence of the same until, following the termination of the employment of Flottemesch by Columbia, which was on or about May 10, 1947, Portner found a copy of the same loose in Flottemesch's desk among other papers."

As opposed to this finding, the following uncontradicted evidence testified to by Columbia's own witnesses, appears in the record:

1. Freeman had been collecting for Columbia since 1938, and had always trans-

acted all of his business through the then credit manager of Columbia, and Portner knew this was the fact;

2. Flottemesch testified that he spoke to Freeman at least several times a week and was in constant contact with him about the accounts;

3. Portner testified that he first gave Flottemesch express authority to recall all delinquent accounts, and then gave him express authority to enter into an arrangement with Freeman for the latter to become the sole collection agent for Columbia;

4. Portner admitted that Flottemesch had authority to sign assignments to Freeman;

5. Portner testified, in response to the question: "As a matter of fact, the handling of the accounts is entirely left to your credit manager?" "That is correct."

When this evidence is considered it appears certain that the finding that Flottemesch did not have authority to enter into the contract is not only unsupported but is contrary to the evidence produced by Columbia. The evidence, as a matter of law, demonstrates that Flottemesch had at least ostensible if not express authority to enter into the challenged agreement.

The law on this subject is reasonably clear. The following sections of the Civil Code are pertinent:

Section 2315. "An agent has such authority as the principal, actually or ostensibly, confers upon him."

Section 2316. "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

Section 2317. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

Section 2318. "Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority."

Section 2319. "An agent has authority:

1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; * * *."

The general principles above stated are summarized in § 50 of the Restatement of the Law of Agency, as follows: "Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it." See, also § 51.

[1] The cases demonstrate that under the uncontradicted evidence Flottemesch had at least ostensible authority to enter into the contract with Freeman. The rule, supported by many authorities, is stated as follows in 1 Cal.Jur. 739, § 39: "There are two essential features of an ostensible authority, viz., the third person must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held." Both elements exist here. The only possible interpretation of the evidence is that Freeman believed, and reasonably believed, that Flottemesch had authority to act. The evidence of Portner and Flottemesch, already summarized, demonstrates that his belief was "generated" by the acts of Columbia and its duly authorized agents.

Portner admitted that he gave Flottemesch express authority to arrange with Freeman to handle all of Columbia's accounts. But Columbia urges, in effect, that although Flottemesch had authority to contract with Freeman, he entered into a contract providing that Freeman was to receive, if the accounts were recalled, an amount in excess of what Columbia thinks is reasonable, and in excess of what Portner thought would be the basis of the contract. Stated legally, the real question presented is whether a principal is bound when his agent, with power to contract, contracts for a sum in excess of what the principal believes is reasonable. The answer to this question is clear, and is supplied by the case of Whitton v. Sullivan, 96 Cal. 480, 31 P. 1115. That was an action brought by Whitton against Sullivan for services rendered by Whitton as a stenographer. Sullivan was running for Congress. He authorized an agent to enter into a contract for stenographic services, but testified that he expressly limited the agent's authority to a contract to pay for such services only if he won the election. The agent contracted with Whitton to pay 30 cents a folio, without limitation. Sullivan lost the election and refused to pay. It will be noted that the case is a much stronger one in favor of the principal than is the instant one, because in the Whitton case the agent with power to contract had an express limitation upon his powers, while in the instant case, the claimed limitation at most was implied. The Court stated 96 Cal. at page 483, 31 P. at page 1115:

"It will thus be seen that Bowden was authorized by appellant to make a contract with respondent to perform this work, and under such authorization he made a contract with respondent, who performed the work thereunder. Appellant's cause of complaint is, simply, that his agent, Bowden, exceeded the limitations placed upon his powers, by contracting to pay respondent a greater price for the work than was included in his authority of agency. But this is a matter between the principal and his agent, and with which the party doing the work has no concern.

"This principle is clearly declared in Mechem on Agency, Section 283, where the author, speaking as to general and special agents, says: 'In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, and not upon the instructions given. Or in other words, the principal is bound to third persons who have relied thereon in good faith, and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent, and this, too, whether the agency be a general or a special one.' "

[2] While it is true that in the above case the principal conceded that the agent had authority to contract, and that in the instant case Columbia claims its credit manager had no such authority, as already pointed out, Portner admitted he gave authority to Flottemesch to enter into a deal with Freeman to serve as sole collection agent. Having such authority, any limitation on that authority which would prevent him from contracting with Freeman for such purpose was a secret limitation and does not release the principal from liability. Case v. McConnell & Forrester, 5 Cal.App.2d 688, 692, 44 P.2d 414.

[3] The same principle is illustrated by the case of Robinson v. American Fish, etc., Co., 17 Cal.App. 212, 119 P. 388. There an agent contracted with respondent for the purchase of fish. The principal contended that the agent only had authority to contract for the purchase of fish on consignment. It was held that the agent had ostensible authority to contract for the absolute purchase of the fish and that the limitation on his authority was without legal effect so far as third persons were concerned. In so holding, the Court stated, 17 Cal.App. at page 219, 119 P. at page 390: "The law will not, of course, permit a principal to escape the liability which it attaches to him by reason of such circumstances, as are present here upon the plea that the agent has violated or transcended some limitation that he has secretly or without the knowledge of those with whom his agent as such is to deal placed upon the latter's authority as such agent, and in this case it will imply from the conduct of appellant authority in Junta to make the agreement into which the jury found that he entered with Meng. As is said by all the law writers and all the cases, the rule is that 'quiescence is tantamount to acquiescence,' and forbids the principal denying an authority which his own conduct has invited those with whom he was dealing to assume. * * * 'Where the special character of the agency is not known, and the principal has clothed the

agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume.' Clark on Contracts, p. 734, and cases cited." See, also, Safeway Stores v. King Lumber Co., 45 Cal.App.2d 17, 22–23, 113 P.2d 483; Gaine v. Austin, 58 Cal.App.2d 250, 260, 136 P.2d 584; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 705, 75 P. 329.

[4] Under these cases, and many more that might be cited, it follows that the findings and conclusion that Flottemesch had no actual, implied or ostensible authority to enter into the contract are totally unsupported, and contrary to the testimony of Columbia's own witnesses. It must be held that, as a matter of law, Flottemesch had at least ostensible authority to enter into the contract of May 9, 1946. This being so, the knowledge of Flottemesch is imputed to the principal. Columbia Pictures Corp. v. DeToth, 87 Cal.App.2d 620, 630, 197 P.2d 580.

Other Arguments of Columbia.

[5] Columbia quite properly contends that if the judgment may be sustained on any theory, it must be affirmed. This requires a consideration of the other findings and conclusions of the trial court.

[6] The trial court concluded "That Freeman was guilty of fraudulent conduct toward Columbia in seeking to procure and procuring from Edward Flottemesch the purported letter agreement of May 9, 1946." It was apparently the theory of the trial court that this conclusion was justified in view of Columbia's claim that the "recall provision" was incorporated into the agreement although not previously discussed, and the agreement purports to "confirm our oral agreement." Columbia also contends that the fact that Freeman agreed to prepare a "rough draft" and then consulted his attorneys, in some way constituted a fraud upon Columbia. The findings and conclusion that Freeman was fraudulent are totally unsupported in law or in fact. Freeman agreed to draft the type of agreement he wanted. Admittedly, the reason he wanted the written agreement was because he wanted to protect himself against the recall of the accounts, as had just been done. Freeman, as any sensible and reasonable business man would do, consulted his lawyers. Certainly, it would be a novel proposition to hold that if a business man about to enter into a contract that would change the future nature of his business, consults his lawyers without notifying the other contracting party, he is guilty of fraud. No such inference is possible. After preparing the contract, Freeman first read it over the telephone to Flottemesch and then sent him two copies through the mail. No pressure was put upon the credit manager. He had plenty of time and opportunity to consult his superiors or the company lawyers. The fact that he did not do so, does not make Freeman guilty of fraud.

[7-9] The court also found and concluded that if the contract should be construed to require payment of one-half of the principal on recall by Columbia, such provision "is unconscionable and therefore unenforceable." This action is at law, not in equity. Normally, the adequacy of the consideration, in the absence of fraud, duress, or mistake, cannot be inquired into in such an action, even though its terms may be harsh. Gazos Creek Mill, etc., Co. v. Coburn, 8 Cal. App. 150, 156, 96 P. 359; Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484. While it is true that where the contract is one "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." Swanson v. Hempstead, 64 Cal.App.2d 681, 688, 149 P.2d 404, 407, the court will not enforce it, this contract was not of such a nature. It must be remembered that this is not a case of one person skilled in the business contracting with a novice. Freeman and Columbia both had years of experience in the problems growing out of the collection of delinquent accounts. Flottemesch was a credit manager. Under such circumstances, the adequacy of the consideration was for the parties to pass upon.

[10] The conclusion that Freeman violated the contract by refusing to accept

back the accounts tendered to him by the attorneys for Columbia is unwarranted. Portner demanded back all accounts on which collections had not been "begun." Freeman asked for a clarification. Portner refused to give it to him. Flottemesch then categorically demanded in writing the return of all accounts on which suit had not been filed. Freeman complied with the request. Flottemesch, legally, having ostensible authority to enter into the contract had authority to send this letter amplifying Portner's ambiguous demand. After the accounts were recalled Freeman was not required to reaccept them.

[11, 12] Columbia also seeks to uphold the judgment on the theory that if the contract be construed to require payment of one-half the face amount of all recalled accounts, such provision "constitutes a penalty and is therefore unenforceable," as the trial court concluded. It is the theory of Columbia that the provision in question, in legal effect, amounted to an attempt to fix in advance the amount of damages, was therefore a penalty, and violates § 1670 of the Civil Code. Freeman correctly points out that this is not an action to recover damages for a breach of contract. By recalling the accounts, Columbia did not break the contract. It was exercising an express right or option given to it by the contract. It was simply complying with the contract, and exercising its option under the contract. Kuhlemeier v. Lack, 50 Cal.App.2d 802, 123 P.2d 918; Payne v. Pathe Studios, Inc., 6 Cal.App.2d 136, 44 P.2d 598. It is true that if the contract had provided that a recall of the accounts would constitute a breach, and then provided the damages in case of a breach, such provision would be a penalty and unenforceable. (8 Cal.Jur. p. 844, § 94.) Of course, if the provision in fact or in law was a penalty provision, the fact that it was couched in terms of an option, would not prevent it being interpreted as a penalty. White v. City of San Diego, 126 Cal. App. 501, 508, 14 P.2d 1062. But in the instant case it is obvious that the "recall" provision is not a subterfuge for a penalty. The provision was inserted so as not to place Freeman at the whim or caprice of Columbia. It was also inserted to protect Columbia, by permitting it to recall accounts if it so desired. It was not a penalty provision at all.

[13] The trial court also concluded that, properly interpreted, the agreement of May 9, 1946, "does not require Columbia to pay any sums to Freeman upon recall of any acounts which had not been collected by him other than costs expended in working such recalled accounts." This purports to be an interpretation of that provision of the contract that gives Columbia the power to "recall, in writing, any or all of the said accounts which we may have heretofore assigned to you, or which we may hereafter assign to you, and in that event you are to receive from us all costs which you may have advanced in working said recalled account or accounts, and also your full commission on the principal sum due on said recalled account or accounts." There being no evidence as to the parties' intent, the construction of this clause is not a question of fact but one of law. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685; In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 355, 182 P.2d 182; In re Estate of Fleming, 31 Cal.2d 514, 190 P.2d 611.

[14] The construction given to this clause by the trial court is in direct violation of the language employed. The clause clearly and without ambiguity gives to Columbia the right to recall any or all accounts transfered to Freeman for collection, whether or not any sum had been collected thereon by suit or otherwise; and required Columbia, in such event, to pay to Freeman his "full commission on the principal sum due on said recalled account or accounts."

Columbia, however, contends that such clause should be limited to accounts on which collections had actually been made, and in this connection relies on the case of O'Connell v. Federal Outfitting Co., 5 Cal. App.2d 327, 42 P.2d 1070. In that case the trial court had held that the Federal Outfitting Company was not liable to a collection agency. This judgment was reversed by the appellate court because of a conflict in the findings of the trial court. That was the actual holding of the case. In the course of its opinion the Court quoted a clause somewhat similar to the one here involved which reads as follows 5 Cal.App.2d at page 330, 42 P.2d at page 1071, "The Federal Outfitting reserves the right to recall any account that they assigned to O'Connell and Nacht and in consideration the Federal Outfitting Co., agree to pay O'Connell and Nacht their full commission plus costs expended for each case thus recalled, where costs have been expended." Also in the course of its opinion the appellate court said of this provision 5 Cal.App.2d at page 330, 42 P.2d at page 1071,"A reasonable interpretation of this section is that the parties intended that the plaintiff should be paid the 'full commission' earned on collections made to date of recall *plus* whatever costs have been expended in making such collections. It will be noted that the commission is not rated on the face of the account assigned but on the 'collections' made. It is just as unreasonable to hold that, if the plaintiff should have paid $7 in court costs on a $500 account which is recalled, he should be entitled to the full commission on the whole account of which none had been collected, as to hold that, if he had collected $400 on the account without suit, he should receive nothing."

In view of the court's actual holding in the case, this interpretation was probably dicta. But even were it not dicta, it would not be controlling here. The basis of the above interpretation was that "the commission is not rated on the face of the account assigned but on the 'collections' made." In our case there is no such provision. Here the Columbia was to pay to Freeman the "full commission on the principal sum due on said recalled account or accounts." Thus, the commission is payable on "the face of the account assigned." The above case is not in point.

It does not necessarily follow, as a matter of law, that Freeman is entitled to recover one-half the face value of all of the 3609 accounts returned by him. He is, of course, entitled to recover all costs expended by him. But the evidence shows that Freeman examined accounts first, to locate the debtor or debtors, and second, to ascertain if the account could be collected. Among the recalled accounts were about 1,000 on which Freeman testified he had decided to file suit. Certainly, as to these, he is entitled to one-half the face value. But if there are accounts among the other 2,000 odd which Freeman's investigations had determined were uncollectible, he is entitled to no portion of them. If any such accounts exist, reasonable good faith on Freeman's part would have required him to return them to Columbia, as soon as such fact was ascertained. He should be permitted to gain no advantage by retaining them in his files. This construction applies not only to all accounts, if any, as to which Freeman had not only made a definite determination were uncollectible, but also as to all accounts, if any, as to which, according to his usual practice, he had closed his investigation without locating the debtor.

The judgment appealed from is reversed.

WARD and BRAY, JJ., concur.

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 20878.

Supreme Court of California, in Bank.

Nov. 30, 1949.

Rehearing Denied Dec. 29, 1949.

Petition by the Industrial Indemnity Company, insurer, against the Industrial Accident Commission of the state of California, Hazel Pauline Spidle and others, for an order directing annulment of the commission's award granting certain death benefits to surviving widow and minor children of Vernon G. Spidle, deceased employee.

The Supreme Court, Carter, J., held that the transfer by one partner of his interest in the business to the other individually, did nto avoid the partnership policy of workmen's compensation insurance which provided that if a partnership was the insured it would not include partners and that if policy was issued to an individual then such individual's relatives are not covered, in view of provision of insurance code that in case of partners who are jointly insured, a transfer of interest by one to another does not avoid insurance even though it has been agreed that the insurance shall cease on an alienation of the subject insured and affirmed the award.

Edmonds, J., dissented.

For prior opinion of District Court of Appeal see 198 P.2d 309.

1. Administrative law and procedure ⇨787
Workmen's compensation ⇨1939

The credibility of testimony is for the Industrial Accident Commission.

2. Insurance ⇨145(1)

Where renewal of an existing but expiring policy is requested, no change may be made in the terms of the renewal policy without notice to the insured.

3. Workmen's compensation ⇨1065

Where workmen's compensation policy issued to partnership and partners jointly provided that if partnership was insured it would not include partners but said nothing as to relatives of partners, and provided that if issued to an individual, such individual's relatives were not covered, and insurance statute provided that in case of partners who were jointly insured, a transfer one to another does not avoid insurance even though it has been agreed that insurance shall cease on alienation of subject insured, policy covered partner, who bought copartner's interest in business, and coverage extended to purchaser's son-in-law injured in course of employment. Insurance Code, § 304.

Herlihy & Herlihy and E. Herbert Herlihy, Los Angeles, for petitioner.

T. Groezinger and John A. Rowe, Jr., San Francisco, for respondents.

CARTER, Justice.

Petitioner, insurance company, seeks an annulment of an award of respondent commission reforming and enforcing as reformed a workmen's compensation insurance policy, whereby the widow of the deceased workman, a relative of the employer, was allowed death benefits.

Prior to August 1, 1946, R. C. Cornish and Roland T. Schultz were partners in a business venture. A policy of workmen's compensation insurance was issued to the partnership and to the partners jointly but not severally, running from January 22, 1946, to January 22, 1947, covering all of their employees. On the subject of whether relatives were excluded, the policy provided that if a partnership was the insured it would not include partners but nothing was said as to relatives of the partners. With respect to relatives, it provided that if the policy is issued to an "individual" then such individual's relatives are not covered. Schultz, having sold his interest in the business to Cornish in July, 1946, a new policy was issued by the petitioner dated January 17, 1947, but covering the period August 1, 1946, to August 1, 1947, and presumably the partnership policy was canceled. The new policy ran to Cornish as an individual and the clauses with respect to relatives were the same as in the partnership policy. Thus it could be reasoned that as long as the insured was a partnership, the employees of the partnership would not be excluded even though related to one of the partners, but when an individual was the insured, his relatives are excluded. This presents the question of the extent to which the coverage was intended to be affected by the change of the insured from a partnership to Cornish alone, the individual, when the arrangement was made for the cancellation of the partnership policy to be replaced by an individual-insured policy. That is to say, was it contemplated that the change from a partnership insured to an individual insured would affect only the name in which the policy was to stand, or was it to go farther and bring into operation the clauses that excluded relatives when the insured was an individual rather than a partnership?

The circumstances surrounding the issuance of the above mentioned policies are as follows: The partnership was dissolved on August 1, 1946, and notices of such dissolution were sent to all persons with whom the partners had dealt, including petitioner, and Clarence Haugen. Haugen was an insurance broker who procured the partnership policy for the partnership. While in such capacity he was the agent for the partnership, and later, for Cornish in connection with the procurement of the insurance. There is evidence from which it may be inferred that he was petitioner's agent for the collection of premiums on policies inasmuch as the invoices or bills for premiums from petitioner stated that Cornish should pay the premiums to "your agent" Haugen. On October 23, 1946, Mrs. Cornish, the wife of Cornish, who acted as his bookkeeper and who handled all his insurance matters, called on Haugen to make out payroll reports and see about the change of name resulting from the partnership dissolution. At that time, Spidle Cornish's son-in-law, and his son, Arthur Cornish, were employed by Cornish, and Haugen was aware of the relationship and employment. (There is a conflict on that subject but the evidence clearly establishes it.) The system of arranging for premiums in workmen's compensation insurance contemplates a payment by the insured at the time the policy is ordered. Thereafter, at periodic intervals, sometimes monthly, the insured makes a payroll report to the insurer which shows his employees and compensation received. On the basis of these reports the premium is computed and a statement sent to the insured. There may be a credit in favor of either the insurer or insured depending upon the relation of the figures arrived at by the computation and the initial deposit. Haugen assisted in preparing the reports for August and September, 1946, and the premiums for those months were paid to Haugen. Spidle was listed by name on the payroll and it may be inferred Haugen knew of the presence of his name thereon. Haugen, being doubtful as to how the change in the named insured should be accomplished, telephoned petitioner's office and was advised by a Mr. Furbush that the partnership policy should be sent in for cancellation and the insurance would be rewritten to name Cornish alone as the insured and dated back to August 1, 1946.

In the Report of Referee (Report of Record) dated April 22, 1947, we find this statement: "When the witness [Mrs. Cornish] left the broker's [Haugen's] office after having left with him for cancellation the old compensation and liability policy on the partnership, and arranging for the issuance of a new policy in their stead, the witness remarked to the broker in substance, 'I have nothing to show now that we are insured, are we fully covered?' The broker replied in substance, 'Yes, you are fully covered, don't worry.' The broker had said that he would write a new policy as of Aug. 1, 1946. The broker had been introduced to the defendant's [Cornish's] son, Arthur, and the decedent as the defendant's son-in-law on the Sunday in January when he first came to their house in connection with writing the policy on the partnership." The petitioner stresses the theory that Mrs. Cornish intended to order exactly the same type of policy, with the exception of a change in name from a partnership to an individual insured. It appears quite obvious that the employer intended to order a policy naming him as individual insured with full coverage for all his employees. Much importance is attached to the provision in the original policy declaring that certain relatives are excluded if the insured is an individual. This would seem to be most unimportant since that policy was issued to a partnership under the terms of which such relatives were not excluded. It would seem that what Mrs. Cornish intended to order was a policy extending the same coverage under a different name.

Haugen, at the time Mrs. Cornish took in the old policy for cancellation, called Furbush, admittedly an agent of the defendant carrier, to ascertain the manner in which the matter should be handled. Petitioner states, in its briefs, that Haugen "may have been" its agent for collection of permiums, and that Haugen "was its agent for collection," but it is denied that he was an agent for the purpose of effecting or extending coverage, yet it is admitted that the oral agreement, made by Haugen with Mrs. Cornish, to the effect that the policy of insurance would be retroactive from August 1, 1946, is valid. Haugen then sent a letter to petitioner in which he stated that the partnership policy should be canceled as of August 1, 1946, because of "change of entity" of the insured; that the policy should be "rewritten" effective August 1, 1946, naming Cornish as an individual, as insured; and that enclosed were checks, one for $29.75 for the balance of premium due on partnership policy, and one for $54.21, for premiums on the policy to be "rewritten" according to payroll report for August 1, 1946, to October 1, 1946. No word was heard from petitioner until January 17th or 20th, 1947, when the rewritten policy was finally received by Cornish. This was after the accident occurred (December 10, 1946) in which Spidle lost his life. After that accident, there being some doubt about the coverage of the policy, Haugen communicated with petitioner, and, as a result, a rider appeared on the policy when finally received which specifically named Arthur Cornish as covered although a son of Cornish. Petitioner made no offer to return the premium collected on a payroll with Spidle's name on it either before or after the accident.

[1] Petitioner contends that the evidence is insufficient to establish reformation. We believe that from all of the circumstances and the statutory law a case is made for insurance coverage by petitioner. It is clear that the only thing sought to be achieved by Cornish was the change in the name of the insured from a partnership to him as the succeeding individual owner. Certainly he did not contemplate that the coverage of his policy was to be reduced by such change. He wanted just as full protection as he had before. The change in name was a mere formality. The circumstances present a situation peculiarly within the spirit of the statutory law. "In the case of partners, joint owners, or owners in common, who are jointly insured, a transfer of interest by one to another thereof does not avoid insurance, even though it has been agreed that the insurance shall cease upon an alienation of the subject insured" (Insurance Code, § 304), and the cases holding thereunder that an insurer is liable for an injury to the employee of an individual, who was formerly a partner in a partnership, covered by insurance, the business of which partnership he has acquired and no change in name was made after the dissolution of the partnership. First Nat. Trust & Sav. Bank v. Industrial Accident Comm., 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324; National Automobile Ins. Co. v. Industrial Accident Comm., 29 Cal.App.2d 336, 84 P.2d 201; see, Reed v. Industrial Accident Comm., 10 Cal.2d 191, 73 P.2d 1212, 114 A.L.R. 720. The case of Ocean Accident & Guarantee Corp. v. Industrial Accident Comm., 104 Cal.App. 34, 285 P. 707, is not controlling, for it holds that where, in a workmen's compensation policy, a partnership is the insured and the partners are not covered, the dissolution of the partnership and ensuing employment of the retiring partner by the individual continuing the business is not covered by the policy by reason of section 2557 of the Civil Code, the predecessor of section 304 of the Insurance Code. There was no situation there created which would operate as a trap for the unwary. While it is true that a careful reading of the policy would show that when the name of the insured was changed from a partnership to that of an individual succeeding partner, employees

who were relatives of the individual insured would be excluded, if not specially covered as such, yet section 304 of the Insurance Code, supra, indicates that the "interest in the insurance" passes when one partner buys out the others. That interest should embrace the character of the employees covered. Cornish was justified in assuming that the mere change in name would not limit the full protection he theretofore had and intended to have in the new policy. Petitioner's assertion that Haugen's knowledge was Cornish's knowledge, and the fact that Haugen testified that he knew a policy issued to an individual insured did not cover relatives unless so specified, is not significant, for it would not necessarily follow that Cornish knew that a mere change in name of the insured would have such effect. Haugen contracted the insurer and no such problem was mentioned. Furthermore, the credibility of his testimony was for the commission. It will be remembered that Haugen communicated with petitioner's office as to the mode of procedure when a partnership sells to one of the partners, but was not advised of the effect on the character of the employees covered by the policy by the change of the capacity of the insured.

[2] There is some analogy to the renewal cases in the policy expressed by section 304 of the Insurance Code. Where an insurer requests an existing but expiring policy to be renewed, no change may be made in the terms of the renewal policy without notice to the insured. Connecticut Fire Ins. Co. v. Oakley Improved Bldg. & Loan Co., 6 Cir., 80 F.2d 717; Ouachita Parish Police Jury v. Northern Ins. Co., La.App., 176 So. 639. As above seen, the policy may be interpreted to mean that a change in the name of the insured would result in a change of the employees covered. That is not true in the renewal cases, but here we have more. The petitioner-insurer should have anticipated that Cornish would believe that his relatives would not be excluded by his purchase of the partnership. Haugen was the agent for the insurer in the collection of premiums and it may be said that by that process he became aware of the presence of Spidle's name on the payroll, inasmuch as the premiums are based on the payroll. He knew Spidle was a relative. The premiums which were based on the payroll containing Spidle's name were paid to and retained by petitioner. This has some significance even though such premium would not be enough to cover Spidle as a relative of Cornish, when we consider that Spidle's pay should not form any part of the basis for the premium if the policy did not cover him at all because of his relationship to Cornish, and, further, that petitioner did not even deliver a policy until about three months after it was applied for, and some time after Spidle's fatal accident.

[3] Petitioner relies upon such cases as Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667; Sharman v. Continental Ins. Co., 167 Cal. 117, 138 P. 708, 52 L.R.A.,N.S., 670; Cayford v. Metropolitan Life Ins. Co., 5 Cal.App. 715, 91 P. 266; and Hargett v. Gulf Ins. Co., 12 Cal. App.2d 449, 55 P.2d 1258, for the proposition that knowledge of a soliciting agent is not the knowledge of the insurer. The extent or nature of the application of such a rule is not clear, see Banker's Indemnity Co. v. Industrial Accident Comm., 4 Cal. 2d 89, 47 P.2d 719; Nat. Auto. & Cas. Co. v. Indemnity Accident Comm., 34 Cal.2d 20, 206 P.2d 841, but in any event it would not be of any significance when section 304 of the Insurance Code is considered. Under the circumstances of this case, that section continued the coverage and rendered it effective at the time the liability for compensation arose, that is, the Insurance Code provision preserved the coverage although one of the partners bought the other's interest, and the award is sustainable on that ground.

The award is affirmed.

GIBSON, C. J., and SHENK, and SCHAUER, JJ., concur.

TRAYNOR, Justice (concurring).

Section 304 of the Insurance Code, formerly § 2557 of the Civil Code, provides: "In the case of partners, joint owners, or owners in common, who are jointly insured, a transfer of interest by one to another thereof does not avoid insurance, even though it has been agreed that the insurance shall cease upon an alienation of the subject insured."

Under this section a partnership policy of workmen's compensation insurance is continued on behalf of an individual ex-partner after dissolution of the partnership First National Trust and Sav. Bank v. Industrial Accident Comm., 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324; National Auto. Ins. Co. v. Industrial Accident Comm., 29 Cal.App.2d 336, 84 P.2d 201, thus dissolution does not entail a forfeiture of the insurance. What is the coverage of the insurance contract while it is so continued?

The language of the Code—"a transfer of interest * * * does not avoid [the contract of][1] insurance"—leads to the conclusion that the insurance coverage before partnership dissolution is continued by section 304 at least so long as the policy does not expire or is not terminated by the parties. Under section 304, the insurance held by the partners was not avoided by the transfer from Schultz to Cornish of his interest in the partnership. To ascertain what protection continues after dissolution, one need inquire only which employees were covered by the contract between the partners and the company. All four employees of the partnership, including Spindle, were covered by the insurance, for the clause of the policy excluding relatives was irrelevant to that contract.

In the only case dealing expressly with the coverage of a contract continued under section 304, Ocean Accident & Guarantee Corp. v. Industrial Accident Comm., 104 Cal.App. 34, 285 P. 707, the continuation-of-partnership-contract interpretation, was adopted by the court and resulted in restriction of the insurer's liability. The court was confronted with a dissolved partnership and a claim by one who was formerly a partner but only an employee of his ex-partner when injured. The policy issued to the partners, which remained unchanged after dissolution of the partnership, provided that "this policy shall not apply to any member of such partnership * * *." The court held that the injured ex-partner employee was not covered by the policy even after the change in the partnership. He was not covered when the contract was made, and the policy issued to the partnership continued without change under section 304. Spidle's case is simply the converse situation. Since he was covered when the contract was made, he was covered during the period of its continuance under section 304.

The controlling question therefore is whether that policy was cancelled before the injury resulting in Spidle's death. It is my opinion that the submission of the policy to the company did not result in cancellation, for cancellation was conditional on the continued existence of insurance protecting the employer.

Haugen telephoned the insurance company and inquired about the proper procedure to follow in changing the business entity on the policy. He was instructed to send in the old policy for cancellation and was told that a new policy would then be issued, to be effective retroactively. It is unquestioned that both parties intended the employer to have the benefit of insurance during the interim the new policy was in preparation. Since Cornish was protected by section 304 under the original policy, cancellation would have been for the sole benefit of the insurer as well as at its direction. I cannot believe that either party contemplated cancellation apart from the effective creation of a new contract of insurance.

After noting that contract negotiation must be judged objectively by the manifestations of the parties, the dissenting opinion relies on the legal conclusion of Haugen's secretary that "We cancelled Mrs. Cornish's old insurance policy * * *" even though the opinion thereafter shows at length that Haugen was not the company's agent and could not cancel the policy. A letter from Haugen is also quoted as a manifestation of an intent to cancel. "The letter, directed to the insurer, reads: 'Re: # 546-07595-R.C. Cornish & Schultz DBA Cornish & Schultz, Crane Co.

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[1] Insurance is defined in Sec. 22, Ins.Code, as a contract whereby * * *."

"Please cancell [sic] policy effective 8-1-46 as there has been a change of entity. * * *

"Please rewrite this policy effective 8-1-46 as follows:

"R. C. Cornish, an individual, DBA R. C. Cornish Crane Service * * *.

"Enclosed find check of net to cover payroll audit on R. C. Cornish from 8-1-46 to 10-1-46 * * *.'"

This letter does indicate an intent to cancel. But in addition, it manifests the request of the cancelling party for insurance that would be effective on 8-1-46. The objective theory of contracts properly limits our inquiry to the manifestations by the parties of their intent, but does not preclude consideration of the acts and words of the principals in the light of their obvious purposes. In that light, it is clear that Cornish's consent to cancellation and Haugen's authority to cancel were granted on condition that a contract of insurance would be in existence at the moment the old coverage ceased. K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co., 82 Cal.App.2d 120, 185 P.2d 832; Poor v. Hudson, Ins. Co., C.C., 2 F. 432; Holden v. Putnam Fire Ins. Co., 46 N.Y. 1, 7 Am.Rep. 287; Aetna Ins. Co. v. Rosenberg, 62 Ark. 507, 36 S.W. 908.

There was no new contract at the time of Spidle's death because there was no agreement about the extent of coverage. Cornish had only four employees. He never agreed or authorized Haugen to agree to coverage of only half of his work force. The dissenting opinion states: "In the absence of fraud, one who accepts an instrument which on its face is a contract, is deemed to assent to all of its terms, and he cannot escape liability upon the ground that he has not read it". But Cornish did not receive the instrument that purported to represent his contract with the insurer until weeks after the fatal accident. The dissent also points to the original policy issued to the partnership. "There was ample opportunity for Cornish to examine the limitation in the first policy, which was the same standard form used in specifying the new coverage." But Cornish could not have been certain on October 23, 1946, that the "same standard form" used to insure the partnership would be issued to him on January 17, 1947. Moreover, I cannot agree that the use by an insurer of a multiple-purpose form, with clauses in the alternative for different factual situations, can bind one formerly insured to knowledge of all the clauses in the policy totally irrelevant to the contract evidenced by the policy. If Cornish knew any clause in the old policy, it was the one stating, in bold type, "Failure to secure the payment of full compensation benefits to All Employees is a misdemeanor." Cornish paid premiums for four employees and never manifested consent to be insured for any smaller number.

It is difficult to ascertain what intent the insurer manifested concerning the issuance of a new policy. Once it is assumed that Haugen was not the insurer's agent, the only link to the insurance company is found in the telephone conversation that Haugen had with Mr. Furbush, presumably an agent of the company. No testimony of any agent capable of binding the company appears in the record. Because we have only the fragmentary report of the conversation by Mrs. Cornish, it would be unreasonable to assume that the insurance company had done anything but consent to its customary contract of insurance with an individual, under which relatives of the insured are excluded.

Since the parties never agreed on the coverage of the insurance, no new contract existed at the time of Spidle's death. The condition for cancellation was therefore not fulfilled. K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co., 82 Cal.App.2d 120, 185 P.2d 832; Tarleton v. DeVeuve, 9 Cir., 113 F.2d 290, 132 A.L.R. 343. Since the partnership policy, which covered Spidle and was continued under section 304, was not cancelled at the time of his death, the award must be affirmed.

In affirming the award, it must be recognized that the Industrial Accident Commission ordered the reformation of a contract to which the parties never agreed. The problem is academic, however, since the company is liable under the partnership policy for the amount of the award. The company was not prejudiced by the award of reformation because the new policy as issued on January 17, 1947, did cover the only surviving employee-relative. In any event, the policy that the Commission erroneously attempted to reform has expired.

SPENCE, J., concurs.

EDMONDS, Justice (dissenting).

I cannot agree that section 304 of the Insurance Code "continued the coverage [of the policy originally written by the insurer] and rendered it effective at the time the liability for compensation arose." That policy, it appears without conflict, was delivered to the insurer for cancellation before the accident to Spidle occurred. The evidence also shows the acceptance by the insurer of coverage to replace that of the cancelled policy, the new insurance being written as ordered by the agent of the insured.

According to the majority opinion, "Haugen was an insurance broker who procured the partnership policy for the partnership. While in such capacity he was the agent for the partnership, and later, for Cornish in connection with the procurement of the insurance." Schultz sold his interest in the business to Cornish in July and the partnership was dissolved on August 1st. Evidently nothing was done about the insurance until October when Mrs. Cornish and Haugen discussed the policy which was then in effect. He telephoned Furbush of the insurance company for instructions. Furbush stated that it would be necessary to cancel the old policy and write a new one.

The telephone call was made in Mrs. Cornish's presence, and she left the policy written for the partnership with Haugen for cancellation. Anne Kodak, secretary to Haugen, testified that "We cancelled Mrs. Cornish's old insurance policy * * and I mailed in the old policy with the check for the new premium and payroll report at that time."

A letter identified as having been written by Haugen immediately after the interview with Mrs. Cornish fully corroborates the testimony as to the cancellation of the partnership policy. The letter, directed to the insurer, reads:

"Re: # 546-07595-R.C. Cornish & Schultz DBA Cornish & Schultz, Crane Co.

"Please cancel [Sic] policy effective 8-1-46 as there has been a change of entity. * * *

"Please rewrite this policy effective 8-1-46 as follows:

"R. C. Cornish, an individual, DBA R. C. Cornish Crane Service * * *.

"Enclosed find check of net to cover payroll audit on R. C. Cornish from 8-1-46 to 10-1-46 * * *."

Unquestionably the insurer accepted these instructions from Haugen and changed its coverage accordingly. As stated in the majority opinion, "Presumably (the original policy] was canceled." Although the new policy reached Haugen after Spidle was killed, nevertheless there is evidence that it was issued prior to the accident and had been mailed to Haugen.

Mrs. Cornish, as the agent for her husband, manifested her consent to the terms of the new policy by authorizing Haugen to request the insurer to cancel the then existing insurance and rewrite the policy effective as of August 1st in the name of R. C. Cornish, an individual, doing business as R. C. Cornish Crane Service. She was present during Haugen's telephone conversation with the insurer, and made no objection to having the new insurance issued to her husband as an individual.

Her state of mind is immaterial, Zurich, etc., Assur. Co. v. Industrial Accident Comm., 132 Cal.App. 101, 104, 22 P.2d 572. Objectively, both the insured and the insurer manifested consent to the issuance of the new policy. The insured cannot be excused upon the ground that the terms of the policy were not read. There was ample opportunity for Cornish to examine the limitation in the first policy, which was the same standard form used in specifying the new coverage. In the absence of fraud, one who accepts an instrument which on its face is a contract, is deemed to assent to all of its terms, and he cannot escape liability upon the ground that he has not read it, Greve v. Taft Realty Co., 101 Cal.App. 343, 352, 281 P. 641. There would be no point whatsoever in stating the terms of an insurance policy if its conditions and limitation may be vitiated, as suggested in the majority opinion, by the insured's inquiry: "Are we fully covered?" If that were the law, an affirmative answer to such a question might subject the insurer to liability for fire, theft, burglary or other hazards in a policy the terms of which included no such coverage.

Although the majority opinion does not expressly state that Haugen was the agent of the insurer with general powers and to such an extent as to make his knowledge imputable to the company, the decision is impliedly placed upon that ground. As a basis for affirming the award it is said: "There is evidence from which it may be inferred that he was petitioner's agent for the collection of premiums on policies inasmuch as the invoices or bills for premuims from petitioner stated that Cornish should pay the premuims to 'your agent' Haugen." But until this time it would seem to have been settled that an agent for collection of premiums is not an agent for coverage or other purposes. Detroit Trust Co. v. Transcontinental Ins. Co., 105 Cal.App. 395, 287 P. 535; Parrish v. Rosebud Min. & Mill Co., 140 Cal. 635, 74 P.2d 312; Bennett v. Northwestern Nat. Ins. Co., 84 Cal.App. 130, 257 P. 586. It is a general rule, apart from controlling factual variations, that an insurance broker is the agent of the insured "for the purpose of procuring the policy and the insurer only in order to receive and transmit the premiums." Overland Sales Co. v. American Indemnity Co., Tex. Civ.App., 256 S.W. 980, 982; 16 Appleman, Insurance Law and Practice 1944 § 8725. "It is also the general rule that the knowledge of a broker as to facts or matters pertaining to the risk, while imputable to the insured, is not imputable to the insurer." 16 Appleman, Insurance Law & Practice, supra, § 8730, p. 163; Ben Franklin Ins. Co. v. Weary, 4 Ill.App. 74; Reser v. Southern Kansas Mut. Ins. Co., 150 Kan. 58, 91 P.2d 25, 28; Bonewell v. North American Accident Ins. Co., 167 Mich. 274, 132 N.W. 1067, Ann.Cas.1913A, 847; Fire Ass'n of Philadelphia v. American Cement Plaster Co., 37 Tex.Civ. 629, 84 S.W. 1115. Haugen was not an agent of the insurer; he was a broker, and his incidental function of collecting the premiums upon insurance procured by him was not sufficient to charge the insurer with his knowledge for any purpose whatever. Everything which he did in connection with the cancellation of the partnership policy and the procurement of the second policy was in his capacity as the agent of Cornish.

Under these circumstances there is no factual basis whatever for affirming the award upon the ground that Section 304 of the Insurance Code governs the rights of the parties.

The statute is inapplicable where, as here, the initial insurance policy is replaced by a subsequent one. The background and basic purpose of the code section clearly demonstrate that it was never intended to continue an insurance agreement in effect when the original coverage is replaced by a subsequent contract.

A basic rule in the insurance field is that an insurance contract is "* * * considered to be personalized in its risks, involving the moral hazard of possible destruction by the insured, risks of carelessness or neglect, and the courts are reluctant to require the companies to assume dangers not contemplated, and to require them to protect persons with whom no contract was ever made. Being such a personal contract, it is avoided by a sale of the insured property." 4 Appleman, Insurance Law and Practice (1941), § 2741, p. 629, citing Lyford v. Connecticut Fire Ins. Co., 99 Me. 273, 58 A. 916 and Allison v. National Union Fire Ins. Co., 163 Tenn. 246, 43 S.W.2d 202. However, the rule has been qualified to the extent that "* * * where a change in title is merely nominal, and not such as would increase a motive to burn the property or to decrease safeguards surrounding it, the provision [rendering the policy void is] * * * not * * * violated." 4 Appleman, Insurance Law & Practice supra, § 2741, at p. 632, citing Forward v. Continental Ins. Co., 142 N.Y. 382, 37 N.E. 615, 25 L.R.A. 637. Thus, although public policy in general favors the absolute avoidance of insurance when the property is alienated, the courts have refused to apply the rule when the alienation is nominal or essentially so, as in the case of a conveyance from one partner to another, or in the case of dissolution of partnership.

Section 304 reads: "Transfer by partner. In the case of partners, joint owners, or owners in common, who are jointly insured, a transfer of interest by one to another thereof does not avoid insurance, even though it has been agreed that the insurance shall cease upon an alienation of the subject insured." By another statute, insurance is defined as "* * * a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." Sec. 22, Ins. Code. Applying this definition to section 304, it reads: "In the case of partners * * * who are jointly insured, a transfer of interest by one to another thereof does not avoid [the contract of] insurance, even though it has been agreed that the [contract undertaking the indemnification] * * * shall cease upon an alienation of the subject insured." Its principal purpose is to prevent the avoidance of insurance upon alienation of the subject matter in the case of dissolution of a partnership. The section was not intended to abolish the familiar contract rule that a contract is rendered ineffective by mutual consent when it is replaced by a subsequent contract dealing with the same subject matter and containing terms inconsistent with those of the original agreement. The new policy expressly excluded Spidle from its coverage by providing: "If this policy is issued to an individual * * * it is agreed that; anything in this policy to the contrary notwithstanding, this policy does not insure: As respects injuries (or death resulting therefrom) sustained by any of the following relatives of the employer, i. e., * * * son-in-law * * * unless such relative is specifically named in item (III) of the Declarations or specifically insured by Endorsement attached to this policy." Spidle was not named in item (III); nor was he included in the coverage by endorsement.

For these reasons, in my opinion, the award should be annulled.

Rehearing denied; EDMONDS, J., dissenting.

34 Cal.2d 478

PEOPLE v. LETOURNEAU.

Cr. 4961.

Supreme Court of California, in Bank.

Nov. 29, 1949.

Rehearing Denied Dec. 27, 1949.

Armand Letourneau was convicted in the Superior Court of San Francisco County, Albert C. Wollenberg, J., of first-degree murder, and he appealed.

The Supreme Court, Schauer, J., affirmed the conviction, holding that there was no error in exclusion of evidence allegedly tending to show lack of malice aforethought, deliberation, and premeditation, that there was no prejudicial error in giving and omission of instructions on trial of general issue, that there was no showing that jury's determination as to penalty was influenced by conjecture and public opinion, that refusal to permit defendant's wife to give her opinion as to defendant's sanity was not prejudicial error, and that order of trial of issue of insanity was not erroneous.

Carter and Traynor, JJ., dissented.

1. Criminal law ⚷486

In murder prosecution, wherein autopsy surgeon described wounds which caused deceased's death, court properly refused to permit surgeon to answer defendant's question whether the nature of the wounds indicated that defendant was operating under an abnormal state of mind, where there was no proper foundation for question.

2. Homicide 🔑161

On trial of general issue of not guilty in murder prosecution, evidence that nature of deceased's wounds indicated that defendant was operating at the time under an abnormal frame of mind, was properly excluded on ground that it did not show lack of premeditation.

3. Homicide 🔑179

On trial of general issue of not guilty in murder prosecution, defendant's evidence that about six months before homicide he had been confined to psychopathic ward of city hospital was properly excluded, on ground that it did not show lack of premeditation.

4. Homicide 🔑163(1)

On trial of general issue of not guilty in murder prosecution, evidence that defendant had not previously struck or injured any one, was properly excluded on ground that it did not show lack of premeditation.

5. Criminal law 🔑778(5), 1186(4)

Instruction that in homicide cases where killing is proved, it rests on defendant to show justification, subject to qualification that benefit of doubt is to be given to defendant, was erroneous for intimating that any burden of persuasion rested on defendant, and also because it purported to place some burden of persuasion on defendant when merely the fact and not the perpetrator of killing had been proved, but was not reversibly erroneous where defendant admitted committing homicide, and court gave other correct instructions. Pen.Code, § 1105; Const. art. 6, § 4½.

6. Criminal law 🔑1173(2)

In murder prosecution, omission to instruct jury that evidence of oral admissions of defendant was to be viewed with caution was not prejudicial error, where it did not appear reasonable to believe that if the instruction had been given, jury would have come to conclusion that there was a reasonable doubt as to whether defendant acted with premeditation or in carrying out intent to commit rape. Code Civ.Proc. § 2061, subd. 4.

7. Criminal law 🔑836, 1122(5)

If a party is to make any point, whether of commission or omission, in relation to the giving of instructions, all the instructions requested should be filed and included in the record, and each instruction should be identified by a number and should indicate by whom it was requested or that it was given by court of its own motion, and on each requested instruction, trial judge should endorse fact whether it was given or refused or given as modified, with the modification, if any, clearly indicated.

8. Criminal law 🔑1141(2), 1163(4)

On appeal from conviction of murder, burden was on defendant to show affirmatively error and prejudice from giving of instructions on issue of insanity.

9. Criminal law 🔑1122(1)

Where record in murder prosecution wholly failed to show that any instructions other than a single one on insanity phase of trial were or were not requested by either the People or by defendant, but instead records showed a stipulation that an "oral charge" would be given by judge and transcribed by court reporter, defendant did not sustain burden of showing on appeal that there was error in giving of the instruction.

10. Criminal law 🔑863(2), 1174(1)

In murder prosecution, trial judge's statement to jury when jury inquired whether it would be possible for defendant to obtain his release from imprisonment for life by pardon or parole, that question of pardon or parole was a matter for the court and was not a matter for jury's consideration, though incorrect in so far as it stated that question was for the court, was not prejudicial to defendant. Pen.Code, §§ 3040, 3046, 4800; Const. art. 7, § 1.

11. Criminal law 🔑857(1)

Fact that jury in murder prosecution inquired of trial judge, after jury had deliberated for three hours, whether defendant, if given life imprisonment, might later be pardoned or paroled, did not establish that death penalty was influenced by conjecture and public opinion, where trial judge instructed jury that matter was not for jury's consideration.

12. Criminal law ⚷452(2)

In murder prosecution, where there was an issue as to sanity of defendant, trial judge erred in refusing to permit defendant's wife to answer question whether in her opinion, if she had an opinion, defendant was sane or insane at time of homicide, since evidence may be given of the opinion of an intimate acquaintance respecting the mental sanity of a person, if the reason for the opinion is given. Code Civ.Proc. § 1870, subd. 10.

13. Criminal law ⚷1137(6)

Where trial judge in murder prosecution erroneously refused to permit defendant's wife to give her opinion whether defendant was sane or insane at time of homicide, but at the opening of court on the following day, the trial judge asked defendant's counsel to recall defendant's wife so that the question could be placed to her, but defendant's counsel refused to do so, defendant could not complain of the error on appeal. Code Civ.Proc. § 1870, subd. 10.

14. Criminal law ⚷703, 709

In murder prosecution, trial judge did not err in permitting the People to make opening statement to jury on trial of issue of insanity before defendant's counsel made his opening statement, and in permitting the People to open and close the argument to the jury. Pen.Code, § 1369.

◆

George T. Davis and Kenyon C. Keller, San Francisco, for appellant.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

SCHAUER, Justice.

Defendant was charged with the murder of his mother-in-law, Mrs. Rosario Maniscalco, and pleaded not guilty and not guilty by reason of insanity. A jury found that he was guilty of murder of the first degree and did not specifically recommend the penalty; the same jury found that he was sane at the time he committed the murder. Defendant appeals from the ensuing judgment imposing the death penalty and from an order denying his motion for new trial. His principal contention is that the trial court erred to his prejudice by excluding, on the trial of the general issue of not guilty, proffered evidence which assertedly would have tended to show (or raise a reasonable doubt) that he did not possess the mental state ("malice aforethought," deliberation and premeditation) essential to constitute the homicide murder of the first degree. We have concluded, for reasons hereinafter detailed, that defendant has failed to establish error in respect to this contention, and that other points urged by him show no miscarriage of justice.

In support of his main contention defendant relies upon the recent holding of this court (in People v. Wells (1949), 33 Cal. 2d 330, 350, 351, 202 P.2d 53, 66; that "As a general rule, on the not guilty plea, evidence, otherwise competent, tending to show that the defendant, who at this stage is conclusively presumed sane, either did or did not, in committing the over act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible. Thus, if the proffered evidence tends to show not merely that he did or did not, but rather that because of legal insanity he could not, entertain the specific intent or other essential mental state, then that evidence is inadmissible under the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity. The standard by which the trial judge must appraise the admissibility of evidence in every case is, of course, the familiar 'right or wrong' standard * * * by which legal insanity as a defense is gauged. [McNaughten's case (1843), 8 Eng.Rep. R. 718; see 7 Cal.Jur., p. 862, § 21, and cases there cited.] Evidence which tends to show legal insanity (likewise, sanity) is not admissible at the first stage of the trial because it is not pertinent to any issue then being litigated; but competent evidence, other than proof of sanity or insanity, which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible." As is hereinafter shown, the exclusionary rulings of which defendant complains were made upon stated grounds contrary to this holding of the Wells case and, if no other ground for the rulings existed, error would appear; however, such rulings were actually correct because (as in People v. Danielly (1949), 33 Cal.2d 362, 364, 202 P.2d 18, 19, "although the proof of malice aforethought and deliberation and premeditation was, of course, an essential part of the prosecution's case, the rejected evidence was not materially relevant to any theory of defense raised upon the trial of the general issue."

The objective circumstances of the killing, viewing the evidence most favorable to respondent People insofar as it is in conflict,[1] were as follows: In March, 1946, defendant married Catherine, the daughter of Antonio and Rosario Maniscalco. About one month after their marriage, defendant and his wife went to live with the wife's mother and father. Upon the premises were a two-flat dwelling and a small cottage. A son of the Maniscalcos and the son's wife, Roberta, lived in the cottage with their two small children. The elder Maniscalcos and other members of the family lived in the upper flat. Defendant and Catherine lived in the lower flat. Defendant killed not only his mother-in-law, Mrs. Maniscalco, but also his wife's infant niece, Rosario Cecchi, aged about eleven months. He was not charged with the latter killing. The infant Rosario was left in the care of her grandmother, the elder Mrs. Maniscalco, while her parents worked. Defendant and his wife were godparents of the infant girl. Prior to April 21, 1948, the day of the killings, defendant had consistently evidenced great affection for his mother-in-law and the infant niece.

On the morning of April 21, 1948, defendant had "cramps all over" and did not go to work. His wife, who was regularly employed, went to her work, as did other adult members of the family. The only members of the family, aside from defendant, who remained on the premises were Mrs. Rosario Maniscalco (defendant's mother-in-law), the infant Rosario Cecchi, and Roberta and her two children. Some time after ten o'clock, while the mother-in-law was at the grocery store, Roberta was in her bedroom making the beds, and the three children were playing in the cottage. Defendant came to Roberta's kitchen window, stood on a chair, and forced open the window. Roberta went into the kitchen and defendant said, "You better let me in. I am going to get you anyway." Roberta unlocked the door of the cottage and ran to the street. As she passed defendant he "made a grab," caught Roberta's dress, but she "broke loose and ran out * * * and half way down the block." There she met her mother-in-law and told her that defendant "was breaking in the house after me, and she got mad." Roberta returned to her cottage. The mother-in-law went into defendant's flat and Roberta could hear her "hollering real loud," but could not understand what she said. The mother-in-law then returned to Roberta's cottage and picked up the infant Rosario. Defendant called to the mother-in-law from his flat, asking her to help him fix some artichokes. She replied that she would help him and went into his flat carrying the baby. Some time later (how long, Roberta did not recall) defendant returned to Roberta's cottage. The following description of events is taken from her testimony: "he had blood coming down his face, and he asked me for a Bandaid, and I said, 'What happened to you now?' And he said my mother-in-law had hit him with a ring, that he had a little quarrel, and she hit him with a ring." Roberta obtained a bandage and, as she was preparing it, defendant "made a grab for me. * * * He had my dress up and I started to holler, and I turned around, and he had a knife and he said, 'If you holler, I will cut your throat.' And I told my boy to call grandma; and he acted like nothing was wrong. * * [Defendant] grabbed me and pulled me on my little boy's bed * * * and took my pants off." Defendant removed his trousers and completed an act of sexual intercourse with Roberta. Blood from the cut on defendant's face was on her face and "I was trying to get away from him. He kept threatening me and then I said, 'Can I get up and wash the blood off my face?' * * * He said, 'O.K.' And I got up to make a break * * * and he grabbed me and put me on my bed," where he accomplished two more acts of sexual intercourse. He then put on his trousers, combed his hair, and left the cottage. Roberta "waited until he went out, * * and I put my pants on and I ran upstairs to tell my mother-in-law * * * what he had done. * * * [Defendant] was standing at the phone, with the receiver in his hand. * * * He said 'Dial this number,'" and Roberta dialed a number as defendant directed. (Although Roberta did not know it, this was the number of the police station.) She then "started walking away, and he said to me, 'Guess who I am dialing?' And I ignored him, and he said, 'Come over here. There is a murder.'" Roberta at once ran from the house and into the street in search of help. A police officer arrived and Roberta went with him to defendant's flat. The officer tried the door, found it locked, and knocked. Defendant admitted them. "I [Roberta] said, 'Where is my mother-in-law and the baby?' And he said coldly, 'In there.' And it was covered up with the blanket, and I looked, and I ran out."

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[1] Such conflict as exists will hereinafter appear from the summary of defendant's testimony. The basic facts of the charged homicide are not in dispute. In his opening statement to the jury counsel for the defendant frankly recognized the circumstances with which he was confronted. He said: "This is going to be the kind of a case where there is not going to be a dispute whether he did or did not kill these people. * * * There is no disagreement here about the facts. This man did the killing. He killed both people."

In the dining room of defendant's flat were the bodies of his mother-in-law and infant niece. Defendant had struck each of them many times about the head with a wrench, fracturing the skull and inflicting many lacerations and bruises, then, with a carving knife, had stabbed each of them repeatedly in the head, arms, chest, abdomen and thighs and partially eviscerated them.

When he was questioned by the police and a deputy district attorney at about 2:20 in the afternoon of April 21, 1948, defendant gave an account of the killings largely similar to that which he gave in his testimony. According to defendant's testimony, Roberta (sometimes referred to as Bobbie) came into his flat on the morning of the 21st. They were "holding hands" when their mother-in-law came in. Defendant asked the mother-in-law to prepare some artichokes. As the mother-in-law was doing this, holding the baby under her left arm and a cup in her right hand, Roberta said "She is going to squeal," and handed defendant the wrench. Defendant "took the wrench and I did not hesitate, and I hit her. * * * [She swung around and she is a heavy woman, and that cup hit me under the eye here and that got me dizzy a little bit too, and I don't know—I must have hit her some more after that, I guess. I don't quite remember how many times I hurted her, and after that I turned around and Bobbie had the knife in her hand. * * * I don't remember hitting the baby. * * * I don't remember if I did [kill them], but I know I hit her [the mother-in-law]. * * * I am pretty sure I did have that knife. * * * I don't remember cutting them up, though." Defendant changed his clothes and wiped off the knife. At Bobbie's suggestion they went to her cottage, taking the knife to "clean it better." Defendant left the wrench on his kitchen table. In Bobbie's bedroom she voluntarily engaged in sexual intercourse with defendant. Defendant testified that he was not angry at his mother-in-law, that he loved her. Asked, "Why did you hit her on the head with that wrench?" defendant replied, "Bobbie told me she was going to squeal," and again, "I don't know. * * * I didn't realize anything at the time." Defendant testified further that it was only "when he got through having intercourse" that he "realized when she give me that wrench to hit my mother-in-law"; defendant got up, dressed, and went to telephone the police;

he dialed "Information" and asked for the number of the police department; Bobbie came in and defendant asked her to dial the number because "I was shaking * * *. I was nervous; I was scared"; after she had dialed the number Bobbie asked, "Who are you calling?"; defendant replied, "Don't you know what we done downstairs? I am calling the police"; Bobbie said, "No, no, don't call the police," and ran out.

According to the testimony of a police officer relating a statement assertedly made on the afternoon of April 21 defendant remembered that "When I struck her [the mother-in-law] on the head she dropped the baby on the floor. * * * The baby was crying, so I struck the baby, too." Defendant assertedly also remembered at that time that "I stabbed my mother-in-law, and I ripped her open. * * * I also stabbed the baby."

The Exclusion of Evidence Which, Defendant Contends, Would Tend to Show Lack of Malice Aforethought, Deliberation and Premeditation

During his opening statement to the jury defendant's counsel said that he intended to adduce evidence "directed to the mental state of the defendant. Now, I am not talking to you specifically about whether the defendant is sane or insane at this time. * * * We will show you facts which will demonstrate an explosion of the mind * * * that on this occasion he went so far berserk as to be nothing mentally more or less than a wild beast. * * * We are further going to show you * * * that this man only a short time ago was confined in the psychopathic ward of the San Francisco Hospital." Counsel for the People then said, "You are not going to show anything of that kind during the first trial. * * * We are not going to go into this man's * * * sanity." Defendant's counsel replied, "I am not going to show it for the purpose of sanity. I am going to show it for the purpose of demonstrating a possible case of hysterical amnesia, which is a proper question to raise in this trial." Again, defendant's counsel indicated that he intended to present the defense of "loss of consciousness at the particular time the thing happened, that has nothing to do with insanity." The trial judge properly ruled, "That is right." Defendant's counsel concluded his opening statement by saying, "we will have to let the evidence demonstrate for all of us exactly what degree of crime, if any, has been committed." These excerpts from defendant's opening statement indicate that defendant's counsel had a correct understanding as to the type of evidence of mental condition which is admissible on the trial of the general issue; i. e., that he could introduce evidence tending to show that defendant was unconscious at the time of the killings and thus incapable of committing crime (Pen.Code, § 26), and evidence tending to show that defendant did not possess the requisite specific mental state of "malice aforethought" and a deliberate, premeditated intention to kill, so long as the evidence did not tend to show that because of legal insanity, he *could not* possess the requisite mental state. However (and in this, as previously indicated, the case is similar to People v. Danielly (1949), supra, 33 Cal.2d 362, 364, 202 P.2d 18), defendant did not offer competent evidence of mental condition which would tend to negative his possession of the requisite state of mind. The instances of exclusion of evidence of which he complains are as follows:

[1, 2] Defendant's counsel asked the autopsy surgeon who had described the wounds which caused Mrs. Maniscalco's death, "Would you say, Doctor, that whoever inflicted the wounds on this woman certainly must have been operating at the time under an abnormal and just under an abnormal frame of mind, let us say?" The district attorney objected on the ground that "The Doctor cannot possibly answer it categorically." The trial court correctly sustained the objection; no proper foundation for the question had been laid. There is no showing that the doctor had, or legitimately could form, an opinion which could aid the jury in determining the state of mind of the killer who inflicted the wounds. In the absence of some affirmative showing of related materiality it will not be presumed that from mere examination of the

wounds, the autopsy doctor could do more than speculate as to what the state of mind of the killer, insofar as it could properly constitute a subject of expert testimony is concerned, might have been; it is not shown that from the nature of the wounds alone the doctor could draw any material inferences which the jury themselves could not draw.

[3] Defendant unsuccessfully sought to show, on the trial of the general issue, that prior to the homicide he had been in the psychopathic ward of the city hospital. A police officer, testifying for the People, was asked by defendant's counsel on cross-examination, "Did you ascertain at any time whether this man had been confined to the psychopathic hospital in San Francisco?" The People's general objection to this question was sustained; no offer of proof was made. Later on, however, in relation to the incident, defendant testified that approximately six months before the homicide his wife took him to the city hospital, "and when I came back to myself, I was in the coocoo ward." The People moved to strike the quoted portion of defendant's testimony on the ground that it was "self-serving" and "attempting to inject into this hearing a matter that is not proper"; the motion was granted. Defendant did not, on the trial of the general issue, make any offer of proof to show the relevancy of this line of inquiry. (See Brown v. Southern Pacific Co. (1949), 92 Cal.App.2d 639, 207 P.2d 632.) However, it appears from the evidence introduced on the trial of the issue of insanity that the excluded testimony was not relevant to the general issue. At the second stage of the trial, when defendant's inquiry into the subject was not limited, his wife thus described the occasion upon which he was taken to the hospital: Defendant had been "drinking all day"; he became violent, tore up a bed sheet, and announced, "I am getting blind." His wife and brothers-in-law took defendant to the hospital, where he was examined and stayed for one night. On the trial of the issue of insanity a psychiatrist testified that he had seen the city hospital report and that it stated that the doctor who had examined defendant at the hospital "made a diagnosis of some nervous condition—I have forgotten what it was—not a mental condition—and alcoholism and blindness due to * * * a combination of those things." Defendant has not attempted to show the nature of the "nervous condition" and he does not try to explain, and it is not apparent, in what way the above incident would have any bearing on the question whether, six months later, he had the state of mind which would make the killing of his mother-in-law murder of the first or homicide of a lower degree. Certainly the incident does not appear to have any material bearing on the issue as to whether at the time of the homicides he was in a state of unconsciousness.

[4] On the trial of the general issue defendant was not allowed to testify as to his first marriage in Canada in 1936, and the fact that he had never struck his first wife, and the circumstances which led to his separation from his first wife in or before 1940. On the trial of the issue of insanity, defendant testified at length that his first wife had an affair with a worker employed on defendant's farm, became pregnant by this worker, and attempted to poison defendant by giving him tea and soup containing arsenic. Defendant does not explain how, if these incidents actually occurred, they would affect defendant's formation of a deliberate intent to kill Mrs. Maniscalco several years later, in different surroundings, among persons whom defendant had not known at the time of his first marriage. Defendant made no attempt to show that the incidents did not occur or that his belief that they happened was the product of a diseased mind or that they in any way tended to prove that he was subject to amnesia. Thus the testimony as to defendant's first marriage, it developed when all the evidence was in, was relevant to no issue at either stage of the trial.

Defendant was asked, "Before April 21, 1948, did you ever strike or injure any human being?" and answered, "Never did." The prosecuting attorney objected and the trial court ruled, "I will sustain his objection. I think it is irrelevant." There was no motion to strike defendant's answer.

Defendant complains of the sustaining of the objection. However, his answer to the question is in the record and, furthermore, it is not suggested how the extremely general fact that he had or had not previously injured any human being would materially affect the proof as to his state of mind on April 21, 1948.

The above are the only instances of exclusion of testimony which defendant specifies as erroneous because of the asserted relevance of the testimony to his possession of the mental state necessary (on that theory of the case) to consitute the killing murder of the first degree. The evidence adduced at the trial of the issue of insanity and at a subsequent hearing as to whether he was a sexual psycopath has been examined in order to determine whether there was other evidence, relevant on the trial of the general issue, as to which defendant's counsel neglected to make a specific offer of proof at the first stage of the trial because he was led to believe, by the tenor of the trial court's rulings, that it would admit *no* evidence as to mental condition during that stage of the trial. Such examination of the record has disclosed no evidence which should have been before the jury at the time they were considering whether defendant posssessed the conscious and deliberate intent which is an element of first degree murder. There is no expert testimony tending to show that defendant was unconscious or suffering from amnesia at the time he committed the killings; all such testimony is to the contrary. On the trial of the issue of insanity two of the three experts suggested that the manner of the killings was an indication that they may have been sadistic, but no expert testified that he had formed an opinion that defendant was a sadist. On the hearing as to sexual psychopathy the expert evidence in this connection was that the killings were not sadistic, not to arouse sexual desire, but were to eliminate an obstacle to fulfillment of a desire which previously existed. There is no evidence which indicates that killing may not be at the same time sadistic and, in the legal sense, deliberate and premeditated.

Asserted Errors in Instructions on the Trial of the General Issue

[5] Defendant complains of the giving of the following erroneous instruction: "In homicide cases where the killing is proved, it rests on the defendant to show justification, excuse or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the defendant." The instruction resembles section 1105 of the Penal Code.[2] The impropriety of reading that section to the jury is fully discussed in People v. Cornett (1948), 33 Cal.2d 33, 42, 43, 198 P.2d 877, and cases there cited. Under an instruction in the language of that section the jury "may believe that mitigating circumstances do not exist unless the defendant proves the existence of such circumstances by a preponderance of the evidence or by some other degree of proof. Moreover, the instruction is erroneous in that the jury was not fully advised that such an instruction has no application in determining the degree of murder, and that it is applicable only in determining whether the homicide constitutes murder or manslaughter, or is justifiable or excusable. * * * It may have the effect of foreclosing any consideration by the jury that mitigating circumstances, although not sufficient in law to justify or excuse the homicide, may be enough to reduce the crime to second degree murder by counteracting the element of premeditation or deliberation" (page 43 of 33 Cal.2d, page 884 of 198 P.2d). Even though the instruction here given is qualified by the direction that "the benefit of the doubt is to be given to the defendant," this qualification does not correct the instruction, for it is error to in-

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[2] Pen.Code, § 1105: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

timate to the jury that *any* burden of persuasion rests upon the defendant on the trial of the general issue.

However, it does not appear that any miscarriage of justice resulted from the giving of the erroneous instruction, even though its error relates to the only important ultimate question presented by the evidence; i. e., whether the killing was murder of the first or of the second degree. As to this question the jury were correctly and specifically told, "if you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of murder, but still if you entertain a reasonable doubt whether the killing was wilful, deliberate and premeditated, or done in the perpetration or attempt to perpetrate rape, or by lying in wait, then in such a case you cannot find the defendant guilty of murder of the first degree," and "If you find beyond a reasonable doubt that the killing is murder, evidence tending to establish provocation may also be considered by you in determining the degree of the murder, and if, after due consideration of such evidence, you should entertain a reasonable doubt as to whether there existed at the time of the homicide in the mind of the defendant the deliberation and premeditation essential to constitute murder of the first degree, or that the killing was done in the perpetration of rape or attempt to perpetrate rape, or while lying in wait, it would then be your duty to find the defendant guilty of murder of the second degree. I instruct you that if you believe from all the evidence in the case beyond a reasonable doubt that the defendant is guilty of homicide, but have a doubt as to the degree of the offense of which the defendant is guilty—whether it is murder in the first degree, murder in the second degree, or manslaughter, you will give the defendant the benefit of such doubt and find him guilty only of the lowest offense as to which you may find him guilty beyond a reasonable doubt." It does not appear that the jury, in deciding that defendant's admitted intentional striking of Mrs. Maniscalco with a wrench[3] was in course of deliberate, premeditated murder, chose to disregard these detailed, correct instructions and to follow a misleading interpretation of the vague instruction first above quoted. As to the instruction under attack, it may be noted that it is erroneous also in that it purports to place some burden of persuasion on defendant when merely the *fact,* and not the *perpetrator,* of the killing has been proved. This error could have no prejudicial effect here, for defendant admitted that he committed the homicide.

[6] The trial judge did not instruct the jury that the evidence of oral admissions of defendant is to be viewed with caution. (Code of Civ.Proc. § 2061, par. 4.) Defendant complains of this omission and urges that the error was made more serious by the giving of an instruction that circumstantial evidence includes, among other things, admissions and that "There is nothing in the nature of circumstantial evidence which renders it any less reliable than any other class of evidence." There were in evidence admissions of defendant assertedly made to a police officer and a deputy district attorney. Defendant did not deny making these admissions, but testified that he did not recall that, in the course of them, he described the manner in which he cut his mother-in-law and admitted the killing of the baby. He testified, further, that he did not in fact recall the cutting of the woman or the killing of the baby. However, from the entire record it does not appear reasonable to believe that, if the cau-

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[3] Defendant testified: "I took the wrench and I did not hesitate, and I hit her. * * * It was a pipe wrench. * * * I hit my mother-in-law * * * and she swung around and she is a heavy woman * * * and I don't know—I must have hit her some more after that, I guess. I don't quite remember how many times I hurted her. * * * I hit her in the head. * * * I know I hit her there, and when she turned around I hit her again. I might have hit her again but I don't remember how many times. * * * After that * * * I took the knife. * * * I must have cut her up. I don't know what I did. * * * I don't remember if I did [kill her], but I know I hit her. * * * Q. Why did you hit her? * * * Can you explain it? A. No."

tionary instruction had been given and the instruction concerning circumstantial evidence had not erroneously classified admissions as among the sorts of evidence which are not "less reliable than any other class of evidence," the jury would have disregarded the testimony relating to the admissions of defendant assertedly made immediately after the killings, accepted his testimony at the trial that he had no memory of details which he had previously described, and thus come to the conclusion that there was a reasonable doubt as to whether defendant had acted with deliberation and premeditation or in the course of carrying out an intent to commit rape. (See People v. Koenig (1946), 29 Cal.2d 87, 91, 173 P.2d 1.)

On the trial of the issue of insanity (a part of the "entire cause" which it is our duty to examine [Cal.Const., art. VI, § 4 ½]) two court appointed alienists testified that defendant told them that he had hit the woman and the baby with the wrench and slashed and cut both bodies; the third alienist testified that defendant said "he didn't quite remember killing the baby"; defendant stated, further, that he did strike the woman and the baby and remembered taking the knife from Bobbie and returning it to her to be cleaned, but not what he did with the knife between those two occurrences. It thus appears that the extent to which defendant claimed to remember the details of the killings varied somewhat on different occasions. This supports the conclusion that no miscarriage of justice has resulted even if the jury, on the trial of the general issue, gave full credence to the testimony relating defendant's asserted admissions.

[7–9] The record wholly fails to show that any instructions whatsoever, other than a single one on the insanity phase of the trial, were or were not requested by either the plaintiff or the defendant. Instead, the record shows a stipulation that an "oral charge" be given by the judge and transcribed by the court reporter. Under such circumstances, the appellant fails to show and we have no means of ascertaining whether the statement or the omission of any specific proposition of law was requested by a particular party or was given or omitted on the court's own motion. If a party is to make any point, whether of commission or omission, in relation to the giving of instructions, all the instructions requested should be filed and included in the record and, as stated in Vaughan v. Jonas (1948), 31 Cal.2d 586, 596, 191 P.2d 432, 438, "Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated." The burden is on the appellant to affirmatively show error and prejudice therefrom; he has not, on this record, sustained such burden.

Contention that the Jury's Determination as to Penalty was Influenced by Conjecture and Public Opinion

[10] After the jury had deliberated for three hours on the issues raised by the plea of not guilty, it presented, in open court, the following written question to the trial judge: "Does the imposition of 'imprisonment in the State prison for the term of his natural life' allow of later pardon or parole and possible release?" The trial judge stated, "that is something that is a matter for the Court. It is not, in the processes of law, a matter for your consideration * * * and we will not answer it." This reply was in part correct; the possibility of pardon or parole was not for the jury's consideration. (See People v. Alcalde (1944), 24 Cal.2d 177, 189, 148 P.2d 627.) It does not appear that defendant could have been prejudiced by the fact that the trial judge, in a strictly technical sense, erroneously, stated that the questions were "for the Court," whereas the question of pardon is (at least ultimately) for the Governor (Cal.Const. art. VII, § 1; Pen. Code, § 4800) and the question of parole is for the Adult Authority, the power of which is defined by the Legislature (Pen. Code, §§ 3040, 3046).

[11] Defendant complains that the mere asking of the question showed that the

jury, contrary to an instruction which had been given, was being influenced in its deliberations by "conjectures, * * * public opinion or public feeling" that if they recommended a life sentence defendant might some day be released and that such release would be undesirable. He urges that, at the least, the trial judge, when the question was asked, should have reread the instruction forbidding the jury's acting under such influences. But we must presume that the jury followed the instruction which forbade its being influenced by conjecture or public feeling, and accepted the judge's statement that it was not to consider the possibility of pardon or parole. (See People v. Ferlin (1928), 203 Cal. 587, 600, 265 P. 230; People v. Anderson (1932), 120 Cal.App. 5, 8, 7 P.2d 202.)

The Refusal, on the Trial of the Issue of Insanity, to Permit Defendant's Wife to Testify to her Opinion of his Sanity

[12, 13] The trial judge sustained People's objections to the questions, asked of defendant's wife, "What is your opinion, or, have you formed any opinion as to whether he was sane or insane at the time this act was committed?" and "Do you think he is sane, yourself?" These rulings were erroneous. (Code of Civ.Proc. § 1870, par. 10: Evidence may be given of "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given".) The trial judge, on further reflection, came to this conclusion and, at the opening of court the next day, asked defendant's counsel to recall Mrs. Letourneau "so that I may place the question to her." Defendant's counsel replied, "I am through, your Honor, and I don't care about asking her to come back. * * * You can call her and question her if you want to. * * * It was asked at the end of her testimony at the time when it had importance and bearing. To call her back and re-ask her that question would seem to me to defeat the purposes of her being asked the question in the first place. So, I can't see how I can rebuild my case back to the point when the question was asked, without prejudicing my client now. I will have to stand on the record and let it go at that." Having thus rejected the offer of the trial judge to cure the error, defendant cannot now complain of it. (People v. Glover (1903), 141 Cal. 233, 246, 74 P. 745; People v. Hatch (1912), 163 Cal. 368, 377, 125 P. 907; People v. Klopfer (1923), 61 Cal.App. 291, 295, 214 P. 878; People v. Morley (1928), 89 Cal.App. 451, 459, 265 P. 276.) Furthermore, under the circumstances, it is not shown that the error was prejudicial, for Mrs. Letourneau had testified in detail to the conduct of defendant upon which her opinion would have been based, and it does not appear that the jury would have reached a contrary result had it known that one lay witness, the wife of defendant, was of an opinion contrary to that of the three court-appointed experts who testified that in their opinion, based upon the facts to which Mrs. Letourneau testified and other facts, defendant was sane.

The Order of the Trial of the Issue of Insanity

[14] Defendant complains that the trial court did not comply with section 1369 of the Penal Code when, despite defendant's request, it permitted the People to make an opening statement to the jury before defendant's counsel made his opening statement and permitted the People to open and close the argument to the jury. However, that section is in a chapter entitled, "Inquiry into the Insanity of the Defendant before Trial or after Conviction."[4] No section of the Penal Code specifically directs the order of the trial upon a plea of not guilty by reason of insanity, and it has been repeatedly held that defendant has no right to open and close the argument to the

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[4] The section provides, "The trial of the question of insanity must proceed in the following order:

"1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity;

"2. The counsel for the people may then open their case and offer evidence in support thereof; * * *

"4. When the evidence is concluded * * * the counsel for the people must commence, and the defendant or his counsel may conclude the argument to the jury * * *."

jury (People v. Hickman (1928), 204 Cal. 470, 482, 268 P. 909, 270 P. 1117; People v. Goold (1932), 215 Cal. 763, 766, 12 P.2d 958; People v. Kimball (1936), 5 Cal.2d 608, 611, 55 P.2d 483; see also People v. Hardy (1948), 33 Cal.2d 52, 64, 65, 198 P.2d 865 although the trial court may permit him to do so (see People v. Lee (1930), 108 Cal. App. 609, 613, 291 P. 887).

For the reasons above stated, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

For the reasons stated in People v. Wells, 33 Cal.2d 330, 202 P.2d 53 and People v. Danielly, 33 Cal.2d 362, 202 P.2d 18, evidence tending to prove that, at the time of the commission of a crime, a defendant did not have the state of mind which the law requires as an essential element of the offense is admissible upon a trial of the issue presented by a plea of not guilty. To establish the defendant's state of mind, either the People or the defendant may offer any evidence competent under the general rules of admissibility, which is relevant to that issue.

Letourneau's counsel asked the autopsy surgeon who had described the wounds causing Mrs. Maniscalco's death, "Would you say, Doctor, that whoever inflicted the wounds on this woman certainly must have been operating at the time under an abnormal and just under an abnormal frame of mind, let us say?" The district attorney's objection that "The Doctor cannot possibly answer it categorically" was sustained. The majority opinion concludes that the ruling was proper because there was no showing of related materiality, and the inquiry called for an opinion upon a subject which is not a proper subject of expert testimony.

Had the doctor stated that the inflictor of the wounds was then acting under an abnormal frame of mind, his opinion would have been logically relevant to the issue of the defendant's state of mind at the time of the homicide. That there may be a logical correlation between the circumstances of the homicide and the killer's mentation is recognized in People v. Kafoury, 16 Cal. App. 718, 720, 117 P. 938.

Moreover, there is authority for holding that the examination of the autopsy surgeon concerned a subject upon which expert testimony is admissible. In Gibbons v. Redmond, 142 Kan. 417, 49 P.2d 1035, 1040, 103 A.L.R. 893, the issue before the court was the soundness of mind of one who has executed a will. The trial court admitted testimony of an examiner of questioned documents, based entirely upon the appearance of the signature, to the effect that the testator was in an abnormal mental condition at the time he signed the document. The Supreme Court of Kansas recognized that there was fair basis for nonexpert inference of testator's mental faculties from the manner in which the signature was written. Against a contention that the subject was not a proper one for expert testimony, the court stated:

> "* * * because the fact that the question has not heretofore been specifically decided is not sufficient to warrant refusal to admit the testimony. If it were, growth of the common law would be arrested, and it would be frozen where it is.
>
> "At the 1935 commencement, the president of Cornell University, addressing the graduates of the medical school, said there was a tendency on the part of the medical profession and on the part of the legal profession to act on the premise, 'Whatever was, is right.' A decision by this court that the testimony should have been excluded, because there is no established rule of evidence authorizing its admission, would demonstrate soundness of the criticism."

The autopsy surgeon should have been permitted to state whether or not she had an opinion concerning the defendant's mental state derived from her study of the nature and circumstances of the homicide and the means used to accomplish it. Very often an expert in the medical field has formed no opinion as to the particular cause of injury or mental condition, although other members of her profession might have done so.

However, the witness was not asked these preliminary questions. The inquiry directed to her assumed both that such an opinion could be formed by an expert from the data at hand, and that the witness had formed such opinion. Under these circumstances the ruling sustaining the objection was correct only upon the ground that no proper foundation for the question had been laid. There was no attempt by counsel to follow up with questions as to whether such opinion could be formed and whether the autopsy surgeon had any opinion on the subject. It may not be assumed that the court would have restricted his examination for that purpose. In previous inquiry as to the type of instruments which caused Mrs. Maniscalco's death, counsel had properly asked the witness if she had an opinion as to the instruments used before asking for that opinion.

The appellant asserts that the trial judge erred in failing to instruct the jury that evidence of the oral admissions of a defendant are to be viewed with caution. This error was allegedly rendered more serious by the instruction given on circumstantial evidence. In determining that no substantial prejudice resulted, the majority opinion relies upon testimony of two court appointed alienists which was received "[o]n the trial of the issue of insanity (a part of the 'entire cause' which it is our duty to examine [Cal.Const. art. VI, § 4½]) * * *."

I agree that no substantial prejudice resulted from the omission of the instruction, but prejudice could not have been cured or lessened by evidence offered upon the trial of the issue of insanity. At that time the jury had returned its verdict finding Letourneau guilty. The determination of guilt had been made upon the evidence received in the trial of the general issue and the instructions of the court applicable to that evidence. It was then too late for the jurors to reconsider the question of Letourneau's guilt or innocence in the light of the evidence presented on the issue of insanity had they desired to do so.

For these reasons I concur in the judgment.

CARTER, Justice.

I dissent.

Again we have an acknowledgment of the rule that evidence of mental condition is admissible on the trial of the "not guilty" plea as bearing on premeditation, intent, and malice, followed by the refusal to apply it. The same paradox is presented as that which existed in People v. Wells, 33 Cal.2d 330, 202 P.2d 53, and People v. Danielly, 33 Cal.2d 362, 202 P.2d 18, where, in my dissents, I pointed out the injustice which is bound to flow therefrom. This case presents another illustration of the hopeless position occupied by counsel and the trial court in attempting to present evidence on the subject, and the plain intent of this Court to find some reason for not applying the rule it has declared to be applicable.

In the Wells case, supra, it was held that testimony of a physician who had examined defendant was material and pertinent to the issue, but its exclusion was not prejudicial. In the Danielly case other grounds for refusal to apply the rule were borne and given vitality in the fertile mind bent on withholding the benefit of the rule from the defendant. There a physician was offered as a witness to show that defendant did not possess the mental faculties for forming an intent or premeditation, but the majority found it irrelevant, and that the offer of proof was insufficient. Thus the Wells case was deserted in its holding of materiality. In the case at bar, the court again uses irrelevancy and failure to make an offer of proof, adding a "kicker" that no foundation was laid. Defendant put a question to the autopsy surgeon, a duly qualified physician, as to whether the manner in which the bodies were mutilated in the course of the killings would show an abnormal mind. On the score of lack of foundation, whatever may be meant by that, there are several answers. If the "foundation" argument refers to qualification, the parties stipulated to the doctor's qualifications. *No objection was made on* *the ground of insufficient foundation.* If it is meant that there was no showing that the manner of killing would have a bearing upon the mental state of the defendant, the answers are even more numerous. In addition to those above mentioned, it should be noted that neither the trial court nor this court knows whether a physician may give an opinion on mental condition from the manner in which the killing was accomplished. The majority opinion makes the situation even worse when it says: "* * * it will not be presumed that from mere examination of the wounds, the autopsy doctor could do more than speculate as to what the state of mind of the killer * * * might have been; * * *." It will not presume a doctor could so testify, but by its very holding *it presumes conclusively* that *he could not so testify.* In other words, it assumes to know what it holds a doctor cannot know, and precludes the ascertaining of what a doctor may or may not know in his field. Lying at the base of the holding must be the thought that the offer of proof was not sufficient, but the court clearly indicated its intent that no evidence of that class—mental state, would be allowed and therefore an offer of proof is unnecessary. People v. Duane, 21 Cal.2d 71, 130 P.2d 123; Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94; 142 P.2d 741; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597. I say that must be the real basis, for the majority states: "There is no showing that the doctor had, or legitimately could form, an opinion which could aid the jury in determining the state of mind of the killer who inflicted the wounds." That is to say, it demands that defendant show that the doctor's answer would be favorable to him. We are not told *how* he is expected to show that or that a doctor could give an opinion on mental state from the circumstances of the killing. By sustaining the objection to the question put to the doctor, he is foreclosed from showing those very things that the majority criticizes him for failing to establish. From all that appears, the doctor may have had an opinion on defendant's mental state and been able to justify it by his learning and knowledge that there is a rational connection between a person's mental condition and the manner in which he commits a homicide.

I also agree with Justice Edmonds that prejudicial error at the trial on the not guilty plea is not cured by evidence offered upon the trial of the issue of insanity.

In my opinion, the errors committed during the trial were prejudicial and justify a reversal of the judgment.

TRAYNOR, J., concurs.

Rehearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

94 Cal.App.2d 792

NELSON v. COLBECK et al.

No. 14074.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1949.

Leila Nelson sued Paul F. Colbeck and another for personal injuries sustained in a collision between automobiles driven by plaintiff and named defendant, who filed a cross-complaint for injuries sustained by him.

From a judgment of the Superior Court of Contra Costa County, Harold Jacoby, J., on a jury's verdict awarding nothing to either plaintiff or defendant and cross-complainant, plaintiff and cross-defendant appealed.

The District Court of Appeal, Ward, J., affirmed the judgment, holding that the evidence was sufficient to take to the jury the question of plaintiff's negligence proximately causing the collision.

1. Automobiles 🔑245(80)

In action for personal injuries sustained in automobile collision at street intersection, evidence was sufficient to take to jury question of plaintiff's negligence, proximately causing accident, in failing to stop at arterial stop sign before entering intersection.

2. Appeal and error ⚿173(13)

The issue of last clear chance, not raised on trial by requests for instructions or otherwise, should not be raised for first time on appeal.

3. Trial ⚿260(8)

In personal injury suit, refusal of plaintiff's requested instruction that plaintiff's contributory negligence was not established, if it was just as probable that she was free from negligence or that her negligence did not proximately cause injury, as that such negligence contributed to injury as proximate cause, was not error, in view of given instructions adequately covering point.

4. Trial ⚿260(1)

Refusal of correct requested instructions is not necessarily error, if same charge is given jury in other language.

5. Trial ⚿229, 244(1), 260(1)

Refusal of instructions, which are repetitious in substance, only emphasize unduly one party's theory of case, and are covered by instructions given, so far as they contain correct statements of law, is not error.

6. Negligence ⚿135(5)

The defense of plaintiff's contributory negligence is not established, if jury finds by preponderance of evidence that such negligence was not proximate cause of injury sued for.

7. Appeal and error ⚿1064(1)
Automobiles ⚿246(44)

In action for personal injuries sustained in automobile collision at street intersection, instruction to jury that vehicle traveling at 35 miles per hour on dry asphalt or concrete pavement, where grade does not exceed one per cent, must have brakes adequate to stop it within 113 feet, was proper as relevant on question raised by evidence as to condition of brakes on defendant's automobile and his ability to stop and not prejudicial to plaintiff, though there was no question or evidence respecting condition of plaintiff's automobile's brakes or her ability to stop. Vehicle Code, § 670.

8. Appeal and error ⚿110

An order denying a motion for new trial is not appealable.

◆

Frank E. Kilpatrick, Oakland, Hoey, Hoey & Fenstermacher, Martinez, attorneys for plaintiff and appellant.

Tinning & DeLap, J. Vance Porlier, Richmond, attorneys for defendants and respondents.

WARD, Justice.

This is an appeal by the plaintiff and cross-defendant from a judgment on verdict which awarded nothing to either the plaintiff or the defendant and cross-complainant in a personal injury action arising out of an automobile collision.

In the early morning of October 9, 1947, plaintiff, Leila Nelson, was driving a 1941 Ford automobile in a westerly direction along Potrero Avenue in El Cerrito, California, toward the East Shore Highway, a four-lane thoroughfare which extends in a general northerly and southerly direction. At the junction of Potrero Avenue with the East Shore Highway there is an arterial stop sign. The plaintiff proceeded onto the East Shore Highway where her car was struck by a 1946 Dodge sedan being driven in a northerly direction along the highway by the defendant, Paul F. Colbeck. The point of impact was at the intersection, approximately 37 feet from Potrero Avenue and about 26 feet north of the south crosswalk of the highway. Each driver was alone at the time of the accident and no other eye-witnesses testified.

There is evidence that plaintiff had stopped at a stop sign one block east of the East Shore Highway and was proceeding at a "moderate" rate of speed toward the intersection with the highway; that there was little traffic and the streets were dry. The evidence is conflicting as to whether plaintiff stopped at the arterial stop sign located east of the crosswalk where Potrero Avenue enters the East Shore Highway. Plaintiff's testimony contained the following:

"Q. And coming up then to the East Shore Highway, is there a stopsign there at Potrero and East Shore Highway? A. Yes, sir.

"Q. An arterial stopsign at this point, is that right? A. Yes.

"Q. And did you stop at that point? A. Yes, sir.

"Mr. Porlier (counsel for defendant): At what point? Q. The arterial stopsign.

* * *

"Q. Did you stop in the lane immediately adjacent to the arterial stopsign? A. I stopped at the Boulevard stop first.

"Q. And did you shift gears at that time? A. Yes, sir.

"Q. And into what gear did you put your automobile? A. Low.

"Q. Into low gear? A. Yes, sir.

* * *

"Q. Now, Mrs. Nelson, after you had put the car into low gear, then what did you do? A. It varies. You can't see the highway on unless you pull up a little bit [shrubs obstruct view], so I pulled up approximately at that crosswalk, the next line of the crosswalk, because you can't see."

Plaintiff testified that at this point she looked to the left, then right, then to the left again and proceeded across. Defendant's testimony, in part, is as follows:

"Q. Where did this car that was operated by Mrs. Nelson stop? A. She did not stop.

"* * * A. The officer asked me if this car that I had hit, had stopped for the boulevard stopsign, had I known it was not going to stop, could I have avoided the accident?

"* * * A. The answer was, I probably could.

"* * * A. I expected the car to stop. I kept on going, and I saw it wasn't, so I applied my brakes, and saw it was going to be unavoidable for me to keep from hitting her, so from driving 9 months in combat zone, I knew how to protect myself, so at the proper moment, when I saw I couldn't clear her car, I protected my body as much as possible."

The officer investigating at the scene of the accident testified that defendant had told him he was going 45 miles an hour. At the trial defendant testified that his maximum speed prior to the accident was 35 miles an hour; also that he first saw plaintiff when she was approximately 50 feet east of the intersection.

The fact that plaintiff's automobile when towed away was in second gear is not conclusive proof that she had stopped at the arterial stop sign. Such fact would be equally consistent with the view that plaintiff failed to stop, inasmuch as the car still might have been in second gear after starting from a stop at the intersection one block east, or she could have shifted into second from high gear after merely pausing at the stop sign on entering the highway. It is the jury's duty, not that of the appellate court, to infer how her automobile happened to be in that gear.

[1] The facts therefore, as presented by the testimony and stated most favorably for the defendant, are that plaintiff failed to stop at the stop sign and was traveling in second gear when the collision occurred. Defendant was proceeding at 35 miles an hour approximately 50 feet south of the intersection when he first observed plaintiff, who was then about 50 feet east of the highway. Defendant was aware of the fact that arterial stop signs controlled all entering streets such as Potrero Avenue, and expected plaintiff to stop, but when he saw that she was not going to stop he applied his brakes. This evidence was sufficient for the jury to find that plaintiff was negligent and that such negligence was the proximate cause of the accident. It cannot be said as a matter of law that the defendant's actions were the proximate cause and that the verdict of the jury is unjust.

Two cases cited by plaintiff on this appeal, Doyle v. Loyd, 45 Cal.App.2d 493, 114 P.2d 398, and Commonwealth Insurance Company of New York v. Riverside-Portland Cement Company, 69 Cal.App. 165, 230 P. 995, are not applicable to the factual situation here involved. In each of those cases judgment for the plaintiff was upheld on appeal on the ground that although the plaintiff may have been negligent in the operation of his automobile that fact did not prevent his recovering from the operator of another motor vehicle which was being operated negligently,—the fact of proximate cause being a question for the trial court to decide upon the evidence presented. In the instant case there was evidence from which it might be found that defendant was not negligent, that he did all he could to avoid the collision, and that plaintiff was the negligent one.

Girdner v. Union Oil Company of California, 216 Cal. 197, 13 P.2d 915; Glynn v. Vaccari, 64 Cal.App.2d 718, 149 P.2d 409, and Jones v. Yuma Motor Freight Terminal Company, 45 Cal.App.2d 497, 114 P.2d 438, also cited by plaintiff, are all cases in which the judgment of the lower court was upheld. In the Glynn case it was held that the defendant, once he had stopped at the through highway, was at liberty to proceed if there was no immediate hazard. In the Jones case the court held that the jury reasonably could have found the defendant able to prevent the collision after he became aware of the danger. As stated in Page v. Mazzei, 213 Cal. 644, at page 645, 3 P.2d 11, at page 12, quoting from Couchman v. Snelling, 111 Cal.App. 192, 295 P. 845, "Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine. (Citing cases.)"

[2] The issue of last clear chance was not raised on the trial nor were any instructions on that theory refused. The issue should not be raised for the first time on appeal. 2 Cal.Jur., Appeal and Error, § 67; Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Niegel v. Georgetown Divide Water Co., 78 Cal.App.2d 445, 177 P.2d 641.

[3] Plaintiff alleges as error the failure to give the following requested instruction: "By the same principle, it follows that if you should find that it is just as probable that plaintiff was free from negligence, or even if negligent, that her negligence did not contribute as a proximate cause of the injury, as it is that negligence on plaintiff's part did contribute as a proximate cause, then the defense of contributory negligence has not been established." The error alleged is on the ground that no instruction was given which pointed out to the jury the proposition that the negligence of defendant might by a preponderance of the evidence be shown as the actual proximate cause, whereas negligence on plaintiff's part might exist, but nevertheless by equal preponderance not be the proximate cause. The following instructions were given and would seem adequately to cover the point: "Contributory negligence is an affirmative defense, and therefore, unless it is established by evidence offered by the plaintiff, the burden of proof as to such defense is upon the defendant. In this behalf, *it is necessary that the defendant prove by a preponderance of the evidence.* First: *That the plaintiff was guilty of negligence* as the same has been defined to you, that is, you must believe from a preponderance of the evidence that the plaintiff did something which an ordinarily prudent and careful person of the same age and experience would not have done, or failed to do something which such person acting under said circumstances, would have done, *and,* Secondly: *That such negligence,* if any on the part *of the plaintiff, proximately contributed to the injuries complained of.* The failure of the defendant to prove either one of these two elements stated causes the defense of contributory negligence to fall." (Italics added.) "If the evidence in your judgment in connection with any of the issues before you is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof in connection with such issue." Both preponderance of the evidence and proximate cause were explained in other instructions to the jury.

[4–6] Though the requested instructions might have been correct had they been given, a refusal to so instruct is not necessarily error if the same charge has been made in other language. 53 Am.Jur., § 527, p. 424. As held in Chutuk v. Southern Counties Gas Company of California, 21 Cal.2d 372, 132 P.2d 193, it is not error to refuse instructions which are repetitious in substance and would serve only to emphasize unduly a party's theory of the case and which, so far as they contain correct statements of the law, are covered by other instructions given. In this case the court instructed that in order to find contributory negligence the jury must find by a preponderance of the evidence that plaintiff was negligent and also that such negligence was a proximate cause of the injury. The rule is that if it is found by a preponderance of the evidence that such negligence was not a proximate cause then the defense is not established.

[7] Plaintiff also alleges error in the giving of an instruction based on section 670 of the Vehicle Code. The instruction reads: "A vehicle traveling upon a dry asphalt or concrete pavement where the grade does not exceed one per cent must have brakes adequate to bring such vehicle to a complete stop within the distances set forth. A vehicle traveling 35 miles per hour under the conditions set forth above should be stopped in a distance of 113.0 feet." There was no question or evidence with respect to the condition of plaintiff's brakes or her ability to stop, but there was such evidence as to defendant. The negligence issue was raised as to both parties, and as to defendant's negligence such instruction is relevant. Defendant testified in regard to the mechanical condition of his car, the condition of its brakes, the distance he was from plaintiff's car when he first saw it and his ability to stop by application of his brakes at the time he first became aware of plaintiff's position. There were skid marks past the northerly crosswalk of the intersection and it is undisputed that the streets were level and dry at the time of the collision. Defendant testified that he did apply his brakes before the collision. The distance within which his brakes should be able to stop his car would be relevant to the issue of his negligence. The hypothetical conditions set forth in the code section, upon which the table of distances was set, corresponded to those in the present situation. In both Lombard v. Swall, 2 Cal.App.2d 59, 37 P.2d 696, and Ketchum v. Pattee, 37 Cal. App.2d 122, 98 P.2d 1051, it was held that the giving of instructions on what is now section 670 was error, but the evidence and factual situation developed at the trials differed. In the Lombard case there was no evidence as to the distance in which the plaintiff's brakes might have been applied after the defendant was seen, nor that the brakes were applied at all before the collision. Moreover, the streets were covered with snow while the distance table in the code section was fixed on the basis of dry pavement. In the Ketchum case there was no evidence of an attempted stop before the accident. In Moore v. Miller, 51 Cal. App.2d 674, 125 P.2d 576, the court upheld a refusal to give an instruction based on section 670 on the ground that such instruction was *not required* under the facts of that case. In the present case, any prejudice which might have resulted from the giving of this instruction was not in any event to the plaintiff.

[8] The plaintiff has appealed from both the order denying her motion for a new trial and from the judgment. The order denying the motion for a new trial is not appealable and the appeal therefrom is dismissed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

94 Cal.App.2d 834

RUBEL et al. v. PECKHAM et ux.

Civ. 7606.

District Court of Appeal, Third District, California.

Nov. 29, 1949.

Hearing Denied Jan. 26, 1950.

Emory Rubel and Francis Hall sued William Thomas Peckham and Caroline M. Peckham, his wife, for damages and for specific performance of a contract to sell realty to purchaser obtained by plaintiff Hall.

The Superior Court, Yuba County, Warren Steel, J., rendered a judgment adverse to defendants, and defendants appealed.

The District Court of Appeal, Peek, J., affirmed the judgment as modified, holding that a theory not tried in trial court could not be raised on appeal, that contract and complaint described the same realty, and that defendants were improperly awarded damages based on loss of the use of the realty.

1. Appeal and error ⟹882(3)

Where action was tried on theory that a liability existed on part of defendants to convey realty to a plaintiff, defendants could not contend on their appeal that one plaintiff had no enforceable rights under contract for defendants to sell land to such plaintiff as purchaser obtained by the other plaintiff.

2. Appeal and error ⟹882(3)

When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings, and the court renders judgment on that theory, the parties cannot contend for first time on appeal that there was no such issue.

3. Appeal and error ⟹181

Errors not taken advantage of at trial cannot be raised in appellate court.

4. Specific performance ⟹121(9)

In action for damages and specific performance of contract for defendants to convey land, evidence sustained finding that description of land in contract as being a portion of "sec. 21 & 22 Twp. 14 N.R. 4E, lying East of Reeds Creek and comprising 414 acres more or less", described the same realty as did metes and bounds description in complaint which followed the "center line" of the creek.

5. Waters and water courses ⟹89

A conveyance of land which refers to and uses a nonnavigable water course as one of its boundaries conveys the rights of the grantor to the center line of the water course unless the conveyance indicates a different intention by terms expressly limiting the grant.

6. Damages ⟹62(4)

Generally a party injured by a breach of a contract must mitigate his damages.

7. Damages ⟹62(4)

Where defendants failed to convey realty to plaintiff as required by contract, but defendants offered to place plaintiff in possession pending settlement of boundary line controversy, and offer was kept open during entire controversy and was renewed at outset of trial of action for specific performance and damages, plaintiff was improperly awarded damages based on his loss of use of the realty.

◆

Rich, Weis, Carlin & Fuidge, Marysville, for appellant.

Erling S. Norby, Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment ordering them to specifically perform an agreement relating to the sale of certain real property owned by them in Yuba County. In addition, the judgment awarded damages to the plaintiff Rubel for his loss of use of the land by reason of defendants' failure to convey and allowed the plaintiff Hall a real estate Broker's commission for his services in connection with the transaction.

The agreement which formed the basis of plaintiffs' complaint was entered into by the defendants and Hall and among other things provided that defendants would transfer and convey said land to any purchaser obtained by Hall who, by the terms thereof, was constituted defendants' agent to sell the land on the terms and conditions therein set forth. Defendants' answer admitted ownership of the property described in plaintiffs' complaint, admitted the execution of said agreement but denied that the description set forth therein was the same as that set forth in plaintiffs' complaint; denied that Rubel had been damaged by their failure to convey or that Hall had been damaged and affirmatively alleged that prior to the commencement of the action defendants offered Rubel the possession of the property, without prejudice to his right to litigate the question of the easterly boundary thereof, but that Rubel refused said offer and that defendants have at all times been ready, willing and able to convey said land in accordance with the terms of said agreement.

From the record it appears that by reason of defendants' willingness to convey as averred in their answer and the statements and communications of their counsel the case was tried upon the theory that defendants were under a duty to convey the land in question. Thus there were but two real issues before the trial court, (1) whether or not the description of the land as set forth in said agreement was intended to be and actually was the same as the metes and bounds description by which the land was described in plaintiffs' complaint, and (2) the issue of damages, both as to Rubel and Hall.

[1] On appeal, however, the primary contention made by appellants is that as Rubel was not a party to said agreement he had no rights thereunder which he was entitled to enforce. But, as stated, since the case was tried upon the theory that a liability existed to convey the property to Rubel such contention cannot now be raised for the first time on appeal.

[2, 3] The rule is well settled that "When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings and the court renders judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue. Schroeder v. Mauzy, 16 Cal.App. 443, 447, 118 P. 459; Sprigg v. Barber, 122 Cal. 573, 579, 55 P. 419; Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 P. 60; National Union Fire Ins. Co. v. Nason, 21 Cal.App. 297, 299, 131 P. 755. If a case is tried, submitted, and decided on a certain theory, a party will not be permitted to raise for the first time on appeal an objection that could have been obviated if it had been made in the court below. Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 353, 89 P. 93. Errors not taken advantage of at the trial cannot be raised in the appellate court. Morgan v. Hugg, 5 Cal. 409, 410." Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934, 936.

Turning then to the question relating to the description of the land, it appears from the record that the property decreed to be conveyed was described in said agreement as a portion of "sec. 21 & 22 Twp. 14 N.R. 4E, lying East of Reeds Creek and comprising 414 acres more or less." Appellants contend that there is a variance between the phrase "lying East of Reeds Creek", which they argue means from the east bank of said creek, and the metes and bounds description contained in the complaint which description followed the "center line" of Reed's Creek.

[4, 5] Appellants do not, nor could they because of the obvious conflict therein, question the sufficiency of the evidence to sustain the finding of the trial court that the two descriptions were intended to and in fact did describe the same property. It is sufficient to observe that a conveyance of land which refers to and uses a non-navigable water course as one of its boundaries conveys the rights of the grantor to the center line of such water course unless such conveyance indicates a different intention by terms expressly limiting the grant.

[6, 7] Appellants lastly contend that the trial court erred in awarding Rubel damages for the loss occasioned by their refusal to execute the deed. The record establishes and the trial court found that appellants offered to place Rubel in pos-

session of the property pending settlement of their controversy concerning the westerly boundary line of the property. Such offer was kept open during the entire period of the controversy and was renewed at the outset of the trial herein. Thus, in view of the general rule requiring a party, injured by a breach of contract, to mitigate his damages, 8 Cal.Jur. Damages, sec. 43, page 782, it was error to award Rubel damages based on his loss of use of the property and the judgment must therefore be modified to that extent.

As modified the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

GOGUE v. MacDONALD.

Civ. 7701.

District Court of Appeal, Third District, California.

Nov. 28, 1949.

Hearing Granted Jan. 26, 1950.*

Orlie Gogue sued Eugene W. MacDonald for damages for alleged false imprisonment. The trial court in Humboldt County, Delos A. Mace, J., entered a judgment for defendant on demurrer, and plaintiff appealed.

The District Court of Appeal, Adams, P.J., reversed the judgment, and held that the complaint stated a cause of action.

1. Pleadings 🔑34(1)

Pleadings are to be liberally construed to the end that causes will be determined on their merits rather than on pleadings alone.

2. False imprisonment 🔑20(1)

Complaint which alleged that defendant made complaint on oath charging plaintiff with commission of misdemeanor, and procured justice of peace to issue warrant for his arrest on purported charge, which set forth criminal complaint which failed to allege a violation of the statute making it a crime to defraud an innkeeper, and which alleged dismissal thereof after plaintiff's imprisonment with resulting injury stated a cause of action for false imprisonment. Pen.Code § 537.

Harry W. Falk, Eureka, for appellant.

Hill & Hill, Eureka, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment entered in behalf of defendant, MacDonald, after a demurrer had been sustained to an amended complaint which plaintiff declined to amend.

The amended complaint alleged that defendant had, on June 22, 1948, appeared before a justice of the peace in Humboldt County, and "made complaint, on oath, * * * wherein he charged plaintiff with having committed the crime of misdemeanor, *and then and there procured said justice of the peace to issue a warrant* for the arrest of plaintiff on said purported charge." (Italics added.) The criminal complaint sworn to before the said justice of the peace was then set forth, it being alleged therein that defendant Gogue had wilfully and unlawfully defrauded Eugene W. MacDonald by taking and moving his belongings, including his household effects, from a cottage between sunset and sunrise on a given date, and without paying rent due plaintiff amounting to $95, all with the intent and purpose of defrauding, and in violation of Penal Code section 537. The complaint ended with a prayer for the arrest of Gogue. The complaint in this action then further alleged that the justice of the peace had issued a warrant for Gogue's arrest, and that he had been arrested by the sheriff, and held on bail, which he was unable to furnish, and was imprisoned for a period of approximately eight days, when the complaint was dismissed. Plaintiff then alleged injuries by reason of expenses incurred in defending himself, and loss of wages, etc., for which he prayed damages in the sum of $12,500.

* Subsequent opinion 218 P.2d 542.

It is conceded that the criminal complaint failed to allege a violation of Penal Code section 537 which makes it a crime to defraud an innkeeper. The question then is does the amended complaint in this case state a cause of action for damages for false imprisonment.

In Krause v. Spiegel, 94 Cal. 370, 373, 29 P. 707, 15 L.R.A. 707, 28 Am.St.Rep. 137, the complaint alleged that defendant appeared before a justice and falsely and maliciously and without reasonable or probable cause, made a verified complaint charging plaintiff "with having committed slander of and concerning defendant," that he procured the justice to issue a warrant for the arrest of plaintiff upon said charge; that such a warrant was issued and plaintiff was arrested and imprisoned for six hours, but was eventually discharged. The trial court ruled that the complaint did not state facts sufficient to state a cause of action for *malicious prosecution,* and that, in so far as it charged false imprisonment and libel, it was barred by section 340(3) of the Code of Civil Procedure. On appeal the court said that the only question was whether a cause of action for malicious prosecution was stated. It cited cases showing a diversity of opinion. But it also said, 94 Cal. at page 373, 29 P. at page 708: "This case is not like any of those before referred to. Here no criminal prosecution was commenced or prosecuted against the plaintiff. The only charge made before the magistrate was that the plaintiff had slandered the defendant. This was not a charge of a criminal act, and it furnished no ground whatever for the issuance of a warrant of arrest. But when the warrant was issued, and the plaintiff was arrested and imprisoned under it, a cause of action for false imprisonment at once arose in his favor; and, if suit had been brought in time, it could without doubt have been maintained."

In De Courcey v. Cox, 94 Cal. 665, 30 P. 95, the action was for damages for false imprisonment. Demurrer was overruled and defendant answered; there was then a motion by defendant for judgment on the pleadings, which was granted. On appeal the Supreme Court said that the complaint upon which defendant was imprisoned charged De Courcey with having wrongfully retained money overpaid her by mistake; and that defendant proceeded upon the charge as he might have done had it constituted a crime, which it clearly did not. The opinion states, 94 Cal. at page 669, 30 P. at page 96: "In the case now before us the complaint shows that no warrant could legally be issued upon the complaint made against the appellant; that she was not convicted or adjudged guilty of any crime. She was charged with the commission of an act which did not constitute a crime, and therefore the defendant never acquired any jurisdiction to proceed in the matter, and the judgment and commitment are void on their faces. These facts appearing in the complaint, coupled with the arrest and imprisonment of appellant, certainly constitute a cause of action, and the court erred in granting the motion for and entering judgment for the defendant upon the pleadings." That decision was cited and followed in Manning v. Ketcham, 6 Cir., 58 F.2d 948, 949.

In Howe v. Owsley, 123 Cal.App. 550, 11 P.2d 663, an action for malicious prosecution, after judgment for plaintiff, a new trial was granted. The complaint upon which the plaintiff was arrested and imprisoned was almost identical with the one now before us; and it, also, was subsequently dismissed. It stated no cause of action for criminal prosecution. This court said, 123 Cal.App. at page 553, 11 P.2d at page 664: "* * * that if a warrant of arrest was improperly issued directing the arrest of the plaintiff on the charge of having defrauded an innkeeper, it was the mistake or act of the justice of the peace; and that while the defendant might be liable for false imprisonment for procuring the justice to issue a warrant of arrest based simply upon a statement of acts not constituting a crime, and upon an information not charging the plaintiff with a crime, no basis is laid upon which an action for malicious prosecution could be predicated." Also 123 Cal.App. at page 556, 11 P.2d at page 665: "The concluding portion of the complaint praying that a warrant for the arrest of the plaintiff, and that he be dealt with according to law, might furnish the basis for an action against the defendant as an actor in bringing about an unlawful and false imprisonment of the plaintiff."

Also see Nelson v. Kellogg, 162 Cal. 621, 123 P. 1115, Ann.Cas.1913D, 759, an action to recover damages for false imprisonment following an arrest on civil process not allowable because the person arrested was a female. There it was said that the magistrate had no jurisdiction to issue the warrant; and judgment allowing damages to plaintiff was affirmed.

Also see Peters v. Bigelow, 137 Cal.App. 135, 30 P.2d 450; Collins v. Owens, 77 Cal.App.2d 713, 719, 176 P.2d 372.

Kuhn v. McNeal, 41 Ohio App. 485, 181 N.E. 153, is a case similar to this one, it being an action for false imprisonment on a criminal complaint which pretended to charge McNeal with defrauding an innkeeper, but stated no such crime, and upon which complaint the party charged was arrested and imprisoned. On appeal from a judgment in favor of plaintiff the court said that the criminal complaint did not charge an offense, as the premises which had been occupied and for which rent was due, were not within the statute. The court adhered to a rule laid down in an earlier case to the effect that where a justice of the peace, without authority of law, issues a warrant of arrest, both he and the person at whose instance he so acts are liable in an action for false imprisonment at the suit of the party illegally arrested by virtue of such warrant.

In Jones v. Grooms, 56 Ohio App. 351, 10 N.E.2d 958, the rule applied in the Kuhn case was reiterated, and it was held that a demurrer to the complaint in an action for false imprisonment was erroneously sustained. Also see Duncan v. Piper, Tex. Civ.App., 79 S.W.2d 172, 174–175; Strozzi v. Wines, 24 Nev. 389, 55 P. 828, 57 P. 832, 834; McKelvey v. Marsh, 63 App.Div. 396, 71 N.Y.S. 541; Maher v. Potter, Sup., 112 N.Y.S. 102; Yahola v. Whipple, 189 Okl. 583, 118 P.2d 395, 397, citing Strozzi v. Wines, supra.

Respondent relies upon certain language used in the opinion in Stubbs v. Abercrombie, 42 Cal.App. 170, 183 P. 458. But in that case the criminal complaint did state a crime, and the court said, 42 Cal.App. at page 176, 183 P. 458, that the justice who issued the warrant acted legally and that the arrest of the plaintiff under such warrant was legal. Furthermore, there was a trial in that case, while in the case now before us, the only question is whether the complaint states a cause of action. In Stubbs v. Abercrombie, the portion of the opinion relied upon by respondent, 42 Cal.App. at page 177, 183 P. at page 461, is:

"Even if the criminal complaint had lacked the proper allegations to set forth facts sufficient to constitute a public offense, still, under the facts disclosed by the record here, the defendant, Mary E. Abercrombie, would not be liable." But that statement does not refer to the sufficiency of the complaint, but to the facts disclosed upon a trial of the case. Respondent states in his brief that he made known certain facts to the Justice of the Peace, and "having been informed that the stated facts constituted a crime," he signed the complaint; he also says that he "signed a paper prepared by the Justice of the Peace" stating certain facts. The complaint, however, does not reveal that such were the facts. It alleges that defendant "procured said justice of the peace to issue a warrant for the arrest of plaintiff"; and in the complaint he prayed for the arrest of plaintiff in this action. Respondent thus tacitly admits that facts not stated in the complaint in the false imprisonment action must be shown by him in order to relieve him from liability.

In People v. Agnew, 16 Cal.2d 655, 660, 107 P.2d 601, 603, the court quoted from 22 Am.Jur., P. 359, as follows: "If an act is done with the intention of causing the confinement of the person actually confined or of another and such act is a substantial factor in bringing about a confinement, it is immaterial whether the act directly or indirectly causes the confinement." Also see Frickstad v. Medcraft, 100 Cal.App. 188, 194, 279 P. 840, citing Miller v. Fano, 134 Cal. 103, 66 P. 183.

[1, 2] It may well be that on a trial of the action respondent may be able to prove what he argues here, that the arrest and imprisonment of Gogue were not due to action on his part but were the result of false advice given him by the justice of the peace; but in view of the general policy in this state to allow liberality in pleading and to determine causes on their merits rather than on the pleadings alone, we think that the trial court erred in holding that plaintiff's complaint failed to state a cause of action.

The judgment is reversed with directions to the trial court to overrule the demurrer.

PEEK and THOMPSON, JJ., concur.

94 Cal.App.2d 813

PEOPLE v. FINKEL.

Cr. 2604.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1949.

Hearing Denied Dec. 27, 1949.

Joseph Finkel was convicted in the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., for burglary, rape, robbery, assault with intent to commit rape, and simple assault.

From an order denying defendant's motion to annul so much of a judgment as sentenced him to imprisonment for consecutive terms on the felony counts, defendant appealed.

The District Court of Appeal, Nourse, P. J., affirmed the order, holding that the trial court had jurisdiction to order consecutive terms of imprisonment in one judgment.

1. Criminal law ⚷304(16)

On appeal from order denying motion to annul portion of judgment sentencing defendant to consecutive terms of imprisonment for six felonies, of which he was convicted, District Court of Appeal will take judicial notice of transcript of its judgment affirming, on previous appeal, judgment imposing such sentences, especially where text of judgment of affirmance is undisputed and quoted in state's brief.

2. Criminal law ⚷995(6)

The statute providing that when person is convicted of two or more crimes, whether in same proceeding or court or in different proceedings or courts and whether by judgments of same judge or different judges, second or other subsequent judgment shall direct whether terms of imprisonment, to which he is sentenced, shall run concurrently or consecutively, did not exclude power to impose consecutive sentences for several offenses in single judgment. Pen.Code, § 669.

3. Criminal law ⚷984

The statute prohibiting cumulative sentences, where one specific criminal act is punishable in different ways under different code provisions, does not preclude imposition of sentences to consecutive terms of imprisonment on convictions of separate and distinct offenses charged in different counts of indictment. Pen.Code, § 654.

4. Criminal law ⚷984

Burglary, robbery, larceny, rape and assault are separate offenses, for each of which one convicted thereof can be punished.

5. Criminal law ⚷984

Overruling of demurrer to indictment for burglary, rape, robbery, assault with intent to commit rape, and simple assault, as not charging offense in accordance with statute, on argument of people's counsel that several counts of indictment arose out of same set of facts, did not indicate applicability of statute prohibiting cumulative sentences, where one specific act is punishable in different ways under different code provisions, on appeal from order denying motion to annul portion of judgment ordering consecutive terms of imprisonment on felony counts. Pen.Code, §§ 654, 954.

6. Criminal law ⚷984

Limitation of defendant, charged with six felonies and misdemeanor, to ten peremptory challenges of jurors, as on trial for single offense, did not deprive court of jurisdiction to impose cumulative sentences on convictions of felonies.

◆

Joseph Finkel, Represa, in pro per.

Fred N. Howser, Attorney General of the State of California, David K. Lener, Deputy Attorney General, Edmund G. Brown, District Attorney of the City and County of San Francisco, Francis Mayer, Assistant District Attorney, San Francisco, attorneys for respondent.

NOURSE, Presiding Justice.

The appellant herein was convicted in a jury trial, on a single indictment containing thirteen counts, of six counts of felony, to wit, three of burglary, one of rape, one of robbery and one of assault with intent to commit rape, and of one count of simple assault. The offenses were committed against three individuals on three separate occasions. On each occasion there was a burglary and an attack on the person of a female inhabitant, and on one occasion moreover a robbery. On February 11, 1944, defendant was in one judgment sentenced to imprisonment at San Quentin for the period prescribed by law with respect to the six felony counts, the six sentences to run consecutively, and to five months in the county jail for the simple assault, sentence to run concurrently with time already served. On appeal the judgment was affirmed by this court, People v. Finkel, 70 Cal.App.2d 508, 161 P.2d 298, and appellant's petition for a hearing by the Supreme Court was denied September 13, 1945.

On April 25, 1949, appellant filed in the superior court a motion to annul, vacate and set aside the portion of the judgment ordering consecutive terms of imprisonment, on the ground that the trial court was without jurisdiction to order terms of imprisonment to run consecutively where all were imposed by a single judgment and because of other circumstances to be stated hereafter. From the order denying said motion to annul, this appeal is taken by appellant in propria persona.

[1] Respondent argues that appellant cannot show any defect in the original judgment of February 11, 1944, as it was not made part of the record in this case. We think it expedient to take judicial notice of the transcript of the judgment contained in our record on the first appeal, Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333; City of Los Angeles v. Abbott, 217 Cal. 184, 193, 17 P.2d 993, the more so as the text of the judgment is undisputed and quoted in respondent's brief.

It seems doubtful whether the remedy of a motion to annul was available to defendant and whether the order denying such motion is appealable. See People v. Flohr, 30 Cal.App.2d 576, 578, 86 P.2d 862; People v. Scranton, 50 Cal.App.2d 492, 123 P.2d 132. However, as the denial was clearly correct on the merits, we prefer to base our decision on that ground, without determining the preliminary questions mentioned.

[2] For his contention that the trial court lacked jurisdiction to order terms of imprisonment to run consecutively when all are imposed in one judgment appellant relies on the text of § 669 of the Penal Code, which, as far as it is pertinent here, reads: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, *the second or other subsequent judgment* shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be * * *." (Italics ours.) He argues that the use of the words "the second or other subsequent judgment" ex-

cludes the power to make sentences run consecutively when they are contained in one single judgment. The section has never been construed in that manner, see for recent example of consecutive terms imposed in a single judgment, People v. Holman, 72 Cal.App.2d 75, 100, 164 P.2d 297; People v. Rivas, 85 Cal.App.2d 540, 193 P.2d 151; People v. Palacio, 86 Cal. App.2d 778, 195 P.2d 439, and should not be so construed. It cannot be the intention of the legislature that so substantially different effects as the possibility or impossibility of consecutive terms should depend on the mere choice of the form in which sentence is pronounced, in a single or in separate judgments. Compare People v. Carr, 6 Cal.2d 227, 230, 57 P.2d 489. The beginning of the section clearly shows the legislative intent that the discretion of the court to make terms of imprisonment run concurrently or consecutively shall exist in all cases "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges * * *." This statement of the field covered by the section includes the situation existing in this case. The further reference to "the second or other subsequent judgment" as the means by which the discretion should be exercised cannot be intended to restrict the wide extent stated. If the legislature should have intended such purposeless restriction it would have said so expressly, not by indirection. That no such result was intended becomes still clearer when the present text is compared to the one which it replaces. The part of the section quoted was introduced in the code by an amendment of 1935, Stats.1935, p. 1670. Prior to this amendment § 669 read:

> "When any person is convicted of two or more crimes, *the judgment* shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second of subsequent term of imprisonment to which he has been sentenced, as the case may be." Stats. 1931, p. 1052. (Italics ours.)

Obviously the purpose of the 1935 amendment in so far as here quoted was to clarify the intention that the discretion to order concurrent or consecutive serving of sentence was not limited to sentences pronounced in one judgment, as might be mistakenly derived from the use of the words "the judgment" in singular in the 1931 text. It would be absurd to assume that the 1935 amendment purported moreover to exclude the only situation covered without any uncertainty in the 1931 text. A reasonable interpretation in accordance with the obvious legislative intent requires that in this section the expression "the second or other subsequent judgment" be read as meaning "the sentence on the second or other subsequent conviction, whether contained in a single or in separate judgments," notwithstanding the fact that in general the sentences on different counts of an indictment when pronounced as one entity are considered to constitute one single judgment. People v. Ryan, 74 Cal.App. 125, 132, 239 P. 419.

[3-6] Appellant's other arguments are wholly without merit and require no detailed discussion. He refers to section 654 Penal Code, which section only prohibits cumulative sentences where one specific act is made punishable in different ways by different provisions of the code, but does not contend that more than one of the sentences which he received were for one and the same act. To the contrary he states that the different counts of the indictment charged "separate and distinct offenses." This seems correct. It has been held that burglary and robbery or burglary and larceny are separate offenses for each of which defendant can be punished, People v. Snyder, 74 Cal.App. 138, 239 P. 705; People v. Shaffer, 81 Cal.App. 752, 254 P. 666; People v. Taylor, 4 Cal.App.2d 214, 218, 40 P.2d 870 and the same applies equal-

ly to the combination of burglary or robbery with rape or assault. But then the provision of section 654 is not applicable. Appellant states in this respect that his demurrer to the indictment on the ground that the charge was not in accordance with section 954 Penal Code had been overruled upon the argument of counsel for the People that the several counts contained in the indictment arose "out of the same set of facts." Even if we could on this appeal take cognizance of those facts, which do not appear from the judgment roll or from the record at all, they would be irrelevant as to the applicability of section 654. Section 954 Penal Code permits the use of one indictment with separate counts not only in the situation covered by section 654 but wider, where two or more different offenses are connected together in their commission or belong to the same class. The fact that the indictment was upheld is therefore no indication of the applicability of section 654 and the statement that the counts arose "out of the same *set of facts,*" whatever that may mean, does not point to the existence of only one act punishable in different ways, apart from the fact that the argument of counsel is at any rate not decisive. Appellant seems to argue also that the court lacked jurisdiction to impose cumulative sentences because defendant had been limited to ten peremptory challenges of jurors as upon a trial for a single offense. There is no relation between that power and any limit or peremptory challenges whether correct or not.

The question whether the overruling of the demurrer to the indictment and the limiting of the number of challenges were themselves correct is no part of the case before us, which is only concerned with the power of the court to order consecutive terms of imprisonment. Other arguments of appellant which do not purport to sustain the illegality of the consecutive terms but only to strengthen appellant's general moral position do not require mention.

Order affirmed.

GOODELL and DOOLING, JJ., concur.

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94 Cal.App.2d 818

SOLORZA v. PARK WATER CO. et al.

Civ. 16957.

District Court of Appeal, Second District, Division 3, California.

Nov. 28, 1949.

Delores Solorza brought a representative suit on behalf of himself and all other stockholders of the Mutual Water Company of El Jardin Tracts against the Park Water Company, a corporation and others, to rescind the sale and transfer of assets of the corporation.

The Superior Court for Los Angeles County, Benjamin J. Scheinman, J., rendered a judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Vallee, J., affirmed the judgment, and held that plaintiff was not entitled to an award for attorney's fees.

1. Judgment 🔑216

An "interlocutory decree" is distinguished from a "final decree" in that it is not a final and conclusive determination of the rights of the parties, but may be changed or modified as the law and evidence require, except in partition and divorce cases. Code Civ.Proc. § 662.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Decree" and "Interlocutory Decree".

2. Attorney and client 🔑155

Where a common fund exists to which a number of persons are entitled, and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund.

3. Attorney and client 🔑155

Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the fund saved for all classes concerned before it is distributed.

4. Costs ⚷172

Unless specifically provided for by a statute or by express or implied agreement of parties, a party to an action is not entitled to recover attorney's fees. Code Civ. Proc. § 1021.

5. Corporations ⚷214

Where shareholder brought representative suit to rescind sale and transfer of corporate assets, but, shareholder did not exercise right given him by interlocutory decree to rescind sale, and consequently no fund or property was made available to shareholders through his efforts, shareholder was not entitled to award of attorney's fees. Code Civ.Proc. § 1021.

6. Appeal and error ⚷1097(1)

Decision on former appeal is law of the case, and points there made will not be reviewed on second appeal.

◆

Manuel Ruiz, Jr., Los Angeles, for appellant.

Park Water Company and H. H. Wheeler, Paul Overton, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants in a derivative suit on behalf of shareholders of a mutual water company to rescind a sale of all of its assets.

On October 18, 1946, an interlocutory decree was rendered in the action which adjudged:

"1. That the sale and transfer of the assets and property of Mutual Water Company of El Jardin Tracts to Park Water Company be rescinded upon condition that within sixty (60) days from date of entry of this interlocutory judgment the sum of $4,300.00 plus all moneys expended by said Park Water Company for improvements and additions to and upon said properties of said Mutual Water Company of El Jardin Tracts be paid to said Park Water Company.

"2. Upon such payment, said Park Water Company shall account to said Mutual Water Company of El Jardin Tracts for the profits, if any, made by said Park Water Company during the time said properties have been in its possession and under its operation.

"3. Plaintiff to recover $2,000.00, as and for attorney's fees expended in the prosecution of this action. Said sum of $2,000.00 may be deducted from the amount required hereunder to be paid by said Mutual Water Company of El Jardin Tracts to said Park Water Company.

"4. Upon compliance with the conditions hereinabove set out, defendants Park Water Company and H. H. Wheeler shall restore to said Mutual Water Company of El Jardin Tracts all property and assets of said mutual water company coming into their, or either of their, possession, together with any additions and improvements thereto acquired or constructed during the time in which said properties were in their, or either of their, possession, control and operation.

"5. Upon compliance with the conditions hereinabove set out, final judgment of rescission shall be entered herein."

Plaintiff moved for a new trial, which motion came on for hearing on November 27, 1946, at which time the court made an order, the pertinent parts of which were: "* * * said motion is by the Court submitted. Counsel for plaintiff is granted leave, pursuant to Section 662, Code Civ. Proc. to present proposed amendments to Findings of Facts, and Interlocutory Judgment, and to reopen case for further testimony, and to submit authority in re attorney fee."

On March 17, 1947, notwithstanding the order of November 27, 1946, a final judgment was rendered, in which reference was made to the provision in the interlocutory decree providing that plaintiff was entitled to a judgment rescinding the sale upon the conditions there stated and which adjudged that plaintiff take nothing, that the dissolution of Mutual Water Company of El Jardin Tracts was null and void, and "That plaintiff have and recover out of any fund in the hands of said mutual Water Company of El Jardin Tracts arising or resulting from this action, the sum of $2,-

000.00, together with his costs herein, in the sum of $286.90."

On appeal by the plaintiff the final judgment was reversed and the cause remanded "with directions to the court below to afford appellants sixty days from and after the remittitur is lodged therein, within which to comply with the terms of the interlocutory judgment entered herein, and thereafter to enter an appropriate final judgment, based upon appellants making or refusal to make restoration in compliance with the interlocutory judgment." Solorza v. Park Water Co., 86 Cal.App.2d 653, 664, 195 P.2d 523, 530.

On November 18, 1948, the plaintiff not having made restoration in compliance with the interlocutory decree, a new judgment was rendered that plaintiff take nothing and that the dissolution was null and void. This final judgment did not include the provision in the interlocutory decree that plaintiff recover $2,000 for attorney's fees expended in the prosecution of the action. The plaintiff appeals from the latter judgment.

[1] Appellant claims that the court erred in omitting to incorporate the award of attorney's fees in the final judgment of November 18, 1948. An interlocutory decree is distinguished from a final decree in that it is not a final and conclusive determination of the rights of the parties, but may be changed or modified as the law and evidence require except in partition and divorce cases. Thompson v. White, 76 Cal. 381, 383, 18 P. 399; Hughes v. DeMund, 96 Cal.App. 365, 368, 274 P. 405; McAllen v. Souza, 24 Cal.App.2d 247, 250, 74 P.2d 853; Annotation: 169 A.L.R. 121; cf. Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363. The court had the power, therefore, to modify the interlocutory decree as the law and evidence required.

[2, 3] In Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, at page 277, 153 P.2d 714, at page 715, the following pertinent principles of equity jurisprudence were stated: "It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them. 14 Am. Jur. § 74, p. 47; Trustees of Int. Imp. Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157; In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; see, also, notes 49 A.L.R. 1149; 107 A.L.R. 749. * * * [25 Cal.2d at page 284, 153 P.2d at page 719] Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention, and not by reason of an agreement to pay his fees. Buford v. Tobacco Growers' Co-op. Ass'n, 4 Cir., 42 F.2d 791."

[4] The principles quoted from the Winslow case are the only possible basis for an award of attorney's fees in a suit of this nature. Unless specifically provided by statute, or by express or implied agreement of the parties, a party to an action is not entitled to recover attorney's fees. Code Civ.Proc. sec. 1021. There is neither statutory authority nor agreement for an award of attorney's fees in the present case.

[5] The provision of the interlocutory decree awarding attorney's fees to appellant was no doubt predicated on the foregoing principles of equity in the belief that plaintiff would afford himself of the condition specified therein and that as a result of the efforts of plaintiff property would be made available for the shareholders in whose behalf he instituted the suit. Appellant did not exercise the right given him by the interlocutory decree and consequently no fund or property was made available to the shareholders through his efforts. It was, therefore, proper for the court in

rendering the final judgment to exclude the award of attorney's fees therefrom.

[6] Appellant asks us to review the points made by him on the former appeal. This we cannot do. The decision on the former appeal is the law of the case. Sears v. Rule, 27 Cal.2d 131, 136, 163 P.2d 443.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

VERIDDO et al. v. RENAUD.

Civ. 7674.

District Court of Appeal, Third District, California.

Nov. 28, 1949.

Hearing Granted Jan. 26, 1950.*

A. Veriddo and another sued Harold R. Renaud for personal injuries sustained in an automobile collision.

From a judgment of the Superior Court of Sonoma County, Hilliard Comstock, J., for defendant, plaintiffs appealed.

The District Court of Appeal, Adams, P.J., affirmed the judgment, holding that the filing of claims by plaintiffs with defendant, who was a state officer, or the Governor, was a prerequisite to bringing the action.

States ⚷197

Filing of claims with state officer or Governor by persons suing such officer for personal injuries sustained in collision between automobile in which plaintiffs were riding and state's automobile, operated by defendant with state's permission, while acting within scope and course of his employment by state, was prerequisite to bringing of action. Government Code, § 1981.

◆

DeMeo & DeMeo, Santa Rosa, and Charles N. Douglas, San Francisco (M. K. Taylor, Santa Rosa, of counsel), for appellants.

Geary & Tauzer, Santa Rosa (Winfield Achor, Santa Rosa, of counsel), for respondent.

ADAMS, Presiding Justice.

Plaintiffs, A. Veriddo and Santina Gallo, filed an amended complaint in an action for damages for personal injuries sustained by them in an automobile collision, in which complaint they alleged that defendant Renaud, while driving a Plymouth sedan, so negligently and carelessly operated said Plymouth sedan that he ran same into a Ford automobile owned and operated by plaintiff Veriddo and in which plaintiff Gallo was riding as a guest, that both plaintiffs sustained serious injuries and incurred expenses for which damages were prayed. Subsequently, for reasons which do not appear, in an amendment to the amended complaint plaintiffs alleged that Renaud was an employee of the State, that the Plymouth sedan which he was operating belonged to the State, that he was operating same with the permission of the State, and was, at said time, acting within the scope and course of his employment with the State.

To the foregoing complaint Renaud filed a demurrer on the ground that the complaint did not state a cause of action because it failed to allege compliance with section 1981 of the Government Code.

The trial court sustained the demurrer without leave to amend, and from the judgment for defendant which followed this appeal was taken.

Section 1981, supra, provides as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment * * * alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. *In the case of a State officer the claim shall be filed with the officer and the Governor.*" (Italics added.)

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* Subsequent opinion 217 P.2d 647.

Plaintiffs' complaint fails to allege that they or either of them filed a claim with either the officer Renaud, or the Governor, and it is conceded by plaintiffs that they did not do so. They contend that their action is against Renaud alone, as an individual; that the State is not made a party, and therefore the filing of a claim is not a prerequisite to the bringing of this action. They concede that their contentions are contrary to the decision of this court in Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254, but argue that said decision is unsound, and should be overruled.

We think that the decision in Huffaker v. Decker answers all of the arguments presented by appellants, and are not disposed to overrule same.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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94 Cal.App.2d 838

In re DUBOIS' ESTATE.

DUBOIS et al. v. AMERICAN TRUST CO. et al.

Civ. 14044.

District Court of Appeal, First District, Division 2, California.
Nov. 30, 1949.

Proceeding in the matter of the estate of George Dubois, deceased, involving a contest of the will of deceased by George Dubois, Jr., and another, opposed by the American Trust Company, as executor of the last will of the deceased, and others.

The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., found against the contestant, and refused to change an order admitting the will and two codicils to probate, and the contestants appealed.

The District Court of Appeal, Goodell, J., affirmed the order, holding that the will and both codicils constituted the last will of deceased and were properly admitted to probate.

1. Wills 🔑184(1)

A determination expressed in a codicil to make an alteration in the will in one particular negatived by implication any intention to alter it in other respects.

2. Wills 🔑184(1)

A "codicil" is an addition or supplement to a will and is no revocation thereof except in the precise degree in which it is inconsistent therewith unless there be words of revocation.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Codicil".

3. Wills 🔑199

Where, when second codicil was executed, will of testator had already been republished by a first codicil as of the date of the first codicil, the two testamentary documents had become one in legal effect. Probate Code, §§ 25, 101, 106.

4. Wills 🔑184(1)

Where testator executed a will and a first codicil and then executed a second codicil ratifying "my said will so made as aforesaid", second codicil meant only that will of testator had been made on the date thereof and was ratified, and did not mean "exactly as made" or "made in like manner", and words "so made as aforesaid" were redundance, and should be rejected as surplusage. Probate Code, §§ 25, 101.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "So Made as Aforesaid".

5. Wills 🔑184(4)

Where contention of contestants with respect to construction of second codicil of testator would give the codicil a strained and unnatural meaning rather than its ordinary and grammatical one, and would result in intestacy as to the bulk of the estate, and would destroy the general testamentary plan to bring charitable bequests within the tolerance and exemptions of the probate statute, the contention would be rejected. Probate Code, §§ 41, 42, 102, 106.

6. Wills ⚿184(4)

Where charitable bequests were phrased in clear and distinct language, their revocation by a codicil could be effected only by express language equally as clear and distinct as that originally used or by wholly inconsistent dispositions. Probate Code, §§ 72, 74, 104.

7. Wills ⚿184(1)

A mere reference in a codicil to date of original will is no indication of intention to deprive all instruments other than original will of any force, but is a ratification of the will as modified by the codicils.

8. Wills ⚿184(4)

Where testator executed will and first codicil and subsequently executed a second codicil directing that it should be taken as and for a part of the will, and codicil further ratified and confirmed the will "so made as aforesaid" on date designated save and except so far as any part thereof should be revoked or altered by the codicil, second codicil did not limit the will to the document executed on the date designated, modified only by the second codicil, but the will and both codicils constituted the last will of testator. Probate Code, §§ 41, 42, 72, 74, 102, 104.

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J. R. Klawans, San Francisco, Harrison W. Call, San Mateo, for appellants.

Phil F. Garvey, San Francisco (Julia M. Easley, San Francisco, of counsel), for respondent American Trust Co. as executor of the last will and testament of George Dubois, deceased.

Severson & McCallum, San Francisco, for Sister Elizabeth Kenny Foundation, etc.

Jno. U. Calkins, Jr., Calkins, Hall, Linforth & Cunard, San Francisco, for Regents of University of California.

John E. Landon, San Francisco, of counsel.

GOODELL, Justice.

The testator died on May 12, 1947. Three documents were admitted to probate as his last will and testament consisting of a will dated September 26, 1946, a codicil dated November 14, 1946 and a codicil dated April 2, 1947. Appellant George Dubois J., a son of testator, filed a contest wherein he alleged "That by the * * * codicil * * * of April 2, 1947, * * * decedent revoked the codicil * * * of November 14, 1946." He alleged further that by the will and the April codicil decedent had left all the residue of his estate to the Sister Elizabeth Kenny Foundation, a charitable institution, and that such bequest and devise "is in contravention of the limitations imposed by Section 41 of the Probate Code" because made without any waiver by decedent's son and daughter. The court found against him and refused to change its order admitting the will and both codicils to probate. The contestant, joined by his sister, appealed.

By the will of September 26 testator in emphatic language cut off his son and daughter with a bequest of but $2 to each of them. He left $1 to his wife from whom he was separated and with whom he had made an agreement which precluded her sharing in his estate. He left $1000 and his household furnishings to a friend named May Paschich. He left bequests to other friends.

By the will he devised and bequeathed the entire residue of his estate to the Kenny Foundation.

By the first (or November) codicil he expressly revoked the Kenny bequest and made a new disposition of the residue by leaving one-third thereof to the same Sister Elizabeth Kenny Foundation for Infantile Paralysis, Northern California State Headquarters, "to be used by said foundation in the care and treatment of adults and children suffering from infantile paralysis" and two-thirds thereof to the University of California at Berkeley "for the purpose of establishing, setting up, carrying on and maintaining a scholarship and fund for the study of the cure, care, treatment and control of infantile paralysis, and the study of the care and treatment of adults and children suffering from infantile paralysis."

The second codicil which the appellants claim revoked the first codicil reads:

"I, George Dubois * * * do hereby make, publish and declare this present codicil, which I order and direct shall be taken as and for part of my last will and testament heretofore executed on the 26th day of September, 1946.

"First: I do hereby ratify and confirm my said will so made as aforesaid, on the 26th day of September, 1946, save and except so far as any part thereof shall be revoked or altered by this present codicil, and in particular save so far as the same relates to the bequest in favor of my friend and housekeeper, May Paschich, as particularly set out in paragraph Seventh of my said will.

"Second: I do hereby expressly revoke and cancel that certain bequest and devise contained in said paragraph Seventh of my said will dated the 26th day of September, 1946, and which said bequest and devise is in favor of my friend and housekeeper, May Paschich. * * *"

The testator then assigned the death of May Paschich as his reason for the revocation. The April codicil contains no express revocation of the earlier codicil, nor any revocatory language beyond that cancelling the Paschich bequest.

The only question for decision is whether the court was correct in finding that "* * * the testator, intended the first codicil to stand as part of his will, and that the mere failure * * * to mention the first codicil in the second codicil does not present sufficient evidence to justify a determination that he * * * intended to revoke the first codicil."

[1, 2] It is settled law that "A determination expressed in a codicil to make an alteration in the will in one particular negatives by implication any intention to alter it in other respects". 26 Cal.Jur. p. 810; see, also, In re Estate of Ladd, 94 Cal. 670, 675, 30 P. 99. "A codicil * * * is an addition or supplement to a will, and is no revocation thereof, *except in the precise degree in which it is inconsistent therewith,* unless there be words of revocation". In re Estate of Laveaga, 119 Cal. 651, 656, 657, 51 P. 1074, 1076, citing In re Estate of Ladd, supra. (Emphasis added.)

[3] Section 25, Probate Code provides that "The execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil." When, therefore, the April codicil was executed the will of September 26 had been already republished by the first codicil (which referred to it) *as of November 14, 1946, the date of the first codicil,* In re Estate of Ladd, supra, and the two testamentary documents had become one in legal effect. Sec. 101, Probate Code: In re Estate of Ladd, supra. This integration must be borne in mind in the consideration of appellants' arguments that the second codicil severed the first from the basic will and republished the will shorn of the first codicil.

Appellants contend that this shearing was accomplished by the use of certain words in the introduction and in paragraph "First" of the April codicil. In the introduction the testator directs that the present codicil "shall be taken as and for part of" his will of September 26. This language, appellants argue, shows that the testator "is not going to leave to speculation or conjecture or surmise what his will shall consist of or what documents shall comprise his will." This proves nothing, since a fifth or sixth or sixteenth codicil would be just as much a part of a basic will as would a first or second, and it would be so by operation of law without any direction. Moreover, the November codicil had already become part of the basic will by operation of law, and it, too, had used previsely the same directive words as those quoted above. The direction that the April codicil "shall be taken as and for part of" the will did not say that the earlier codicil should no longer be a part thereof.

[4] The "First" paragraph of the April codicil reads: "I do hereby ratify and confirm my said will *so made as aforesaid,* on the 26th day of September, 1946, save and except so far as any part thereof shall be revoked or altered by this present codicil".

(Emphasis added.) Appellants argue that by the four words just emphasized the testator "limits his will to the document executed on the 26th of September, 1946, and *in the manner* it was made on that day, modified only by the language of Codicil II" and that "he limited his will to the manner or in words it was originally drawn." (Emphasis appellants'.)

The testator, however, did not say "in the manner it was made on that day "nor did the four emphasized words mean it. If preceding those four words the testator had by quotation or otherwise indicated the *manner* in which the document of September 26 was worded there might be some room for appellants' argument, but no such antecedent expression is to be found. In Finnegan v. United States, 6 Cir., 231 F. 561, 565, it is said: "'As aforesaid' is an adverbial referential expression, meaning 'in the manner aforesaid,' 'in like manner,' * * *." In that case there was no antecedent language in the indictment to which the words "And so the grand jurors do further present as aforesaid" could apply or relate, hence the court rejected the words "as aforesaid" as mere surplusage. So, in this case, the only antecedent language is the direction that the present (April) codicil shall be taken as part of the will of September 26. The language which then follows, viz., ratifying "my said will so made as aforesaid" cannot be construed as anything further than a repetition of the statement that such will had been made on September 26, and was ratified. There is no basis for appellants' claim that the four words, in the context in which they are found, mean "exactly as made" or "made in like manner." The sentence should be construed as if it simply read "I do hereby ratify and confirm my said will save and except" etc. The words "so made as aforesaid" etc. were sheer redundance and should be rejected as so much surplusage. 26 Cal.Jur. p. 887; In re Estate of Heard, 25 Cal.2d 322, 328, 153 P.2d 553.

[5] To adopt appellants' contention would give to the April codicil a strained and unnatural meaning rather than its ordinary and grammatical one, sec. 106, Probate Code. That codicil used the earlier one as a model. In both codicils the introductory paragraph and the "First" provision read *exactly* the same, down to the point where the first codicil branches off to deal with the Kenny revocation, and the second branches off to deal with the Paschich revocation. Both codicils make themselves part of the will by express reference to its date; both ratify it by repeating the same redundant language "so made as aforesaid", and both contain the phrase "save and except so far as any part thereof shall be revoked or altered by this present codicil."

To adopt appellants' contention would result in intestacy as to the bulk of the estate. See Sec. 102, Probate Code; 26 Cal. Jur. 899; In re Estate of Heard, 25 Cal.2d 322, 326, 153 P.2d 553, supra; In re Estate of Johnson, 107 Cal.App. 236, 239, 290 P. 314; In re Estate of Ottoveggio, 64 Cal. App.2d 388, 148 P.2d 878. Moreover it would destroy the general testamentary plan, see In re Estate of Franck, 190 Cal. 28, 31, 210 P. 417, which, obviously, was to bring the charitable bequests within the tolerance of sec. 41, and the exemption of sec. 42, Probate Code.

[6] The Kenny and University bequests were phrased in clear and distinct language and their revocation could be effected only by express language, secs. 72, 74, Probate Code, equally as clear and distinct as that originally used, sec. 104, Probate Code; In re Estate of Dunn, 32 Cal.App.2d 240, 242, 89 P.2d 667; see, also, In re Ladd, supra, In re Estate of Dominici, 151 Cal. 181, 189, 190, 90 P. 448; 26 Cal.Jur. p. 810, or by wholly inconsistent dispositions. There was no inconsistency in the April codicil since the Paschich revocation *added to the Kenny and University bequests by making the residue larger.*

The only California case cited in support of appellants' contention is In re Estate of Cazaurang, 42 Cal.App.2d 796, 110 P.2d 138, where a holographic codicil was written on the same piece of paper as an earlier will. The court followed In re Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am.St. Rep. 100, and held that because of that physical connection the codicil revived and republished the first will which had been revoked by an intervening will. The Cazaurang case did not embrace the present question whether a later codicil revoked an earlier one by failing to mention it. Moreover the provisions of the Cazaurang codicil were totally inconsistent with those of the intervening will. That case dealt with two wills and one codicil, while this deals with one will and two codicils, and "*There is a distinction between an intermediate will and an intermediate codicil * * * and where the testator by a codicil confirms his will, the will, together with all codicils, is ordinarily taken to have been confirmed.*" 68 Corpus Juris. p. 868. (Emphasis added.) The Cazaurang case, followed recently by us in Re Estate of Carr, 93 Cal.App.2d 750, 209 P.2d 956, has no hearing on this case.

The decisions in the United States and England support the action of the probate court in this case.

[7] In 68 Corpus Juris, "Wills", p. 868, it is said: "* * * A mere reference to the date of the original will is no indication of the intention to deprive all instruments other than the original will itself of any force; in fact such a reference to a will does not effect a revocation of the antecedent codicils, but is a ratification of the will as modified by the codicils."

See, also, 57 Am.Jur., Wills, sec. 489, pp. 340-1 and 1 Page on Wills, Life Ed., sec. 467, p. 850.

In an annotation in 51 A.L.R. 652, at page 728, it is said: "One codicil does not revoke another unless it is clear that the testator intended that it should do so. The legal presumption is against such revocation, unless they are so inconsistent that they cannot stand together. Therefore, an intermediate codicil is not impliedly revoked by a later codicil, in terms confirming the will, but making no mention of the earlier codicil, but if a later codicil makes a disposition of certain property inconsistent with a disposition made in a former codicil, the former is revoked." There is a supplemental annotation at 123 A.L.R. 1395, 1408.

One of the late cases on the subject is Third National Bank etc. v. Scribner, 1939, 175 Tenn. 14, 130 S.W.2d 126, 130, 123 A.L.R. 1385. That case holds, syl. 2, 123 A.L.R. 1385, that "A fourth codicil, declared by its terms to be a codicil to will referred to by date, did not work a revocation of intermediate codicils not mentioned therein and republish only the original will; on the contrary, the reference to the original will by its date was a republication of that instrument together with all intervening codicils, although no specific mention was made of them." It contains an extended review of the subject including the leading English cases. It is interesting to note how the reasoning of the court parallels that of one of our California cases. In discussing the contention that a third codicil reinstated the provisions of the basic will the Tennessee Court said: "It may be assumed, the three codicils being prepared by the same careful hand, had such a thing been intended, a restoration of the daughter to the testator's bounty *would have been declared in language something like as clear and precise as the language used in her disinheritance.*" (Emphasis added.) In Re Estate of Dunn, 32 Cal.App.2d 240, 242, 89 P.2d 667, 668, supra, the court said: "The terms of a will may not be disturbed by language in a codicil unless such language evinces a limitation or change *in words as definite in expression as the terms of the will.*" (Emphasis added.) Compare, also, the quoted language of the Scribner case with that of sec. 104, Probate Code.

Among the English cases discussed and followed in the Scribner case is Green v. Tribe, (1878) 9 Ch.D. 231, where the court said: "Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil? * * * The question, therefore, which I have to consider is whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer."

The Scribner case also cites and follows In the Goods of De La Saussaye, (1873) Vol. III Law Reports (Probate and Divorce), 42, cited and followed in Green v. Tribe, supra.

Other American cases holding the same way are Warnken v. Warnken, Tex.Civ. App.1937, 104 S.W.2d 935, 938; Syfer v. Dolby, 1943, 182 Md. 139, 32 A.2d 529 and In re Lee's Estate, 1901, 16 Pa.Super. 627. In Syfer v. Dolby the court quotes from In re Lee's Estate as follows: "Where a testator in a codicil revokes a provision of his will, and in a second codicil referring to the will by date says: 'I do confirm my said will in all respects, except so far as the same is changed by this codicil', he does not by the second codicil re-establish the provision in the will which had been revoked by the first codicil." [182 Md. 139, 32 A.2d 533.] The Syfer case cites both the Scribner and Warnken cases as well.

Appellants claim that what the court said in Green v. Tribe was simply a dictum, and that Burton v. Newbery (1875) 1 Ch.Div. 234, states the true rule of the English cases. It would seem that what the English courts say respecting their own cases is the best evidence of what those cases hold. Burton v. Newbery was a Chancery Division case, as was Green v. Tribe, and the latter case had this to say respecting the former: "It appears to me that the Master of the Rolls * * * did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a preexisting and valid codicil."

[8] The court was correct in ruling against the contestants and in holding that the will and both codicils constitute the last will and testament.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

STEVINSON WATER DIST. et al. v. RODUNER et al.

STEVINSON WATER DIST. et al. v. CUNEO et al.

Civ. 7663, 7664.

District Court of Appeal, Third District, California.

Dec. 7, 1949.

Hearing Granted Feb. 2, 1950.*

Separate actions by Stevinson Water District and another against W. P. Roduner, and Rachael Roduner, and against Stephen Cuneo and George Cuneo, which were consolidated.

The Merced County Superior Court, Stanley Murray, J., enjoined the defendants from diverting any foreign water from Owens Creek to which their lands are riparian, and the defendants appealed.

The District Court of Appeal, Thompson, J., held that the findings and judgment were inadequate and uncertain, and reversed the judgments.

1. Waters and water courses ⚷152(6)

In action in the nature of a suit for apportioning of water of creek between defendants whose lands were riparian to the creek and the plaintiffs who claimed as statutory appropriators, the burden was on the plaintiffs to definitely show the quantity of water flowing in the creek to which they claimed superior rights by appropriation or otherwise.

2. Waters and water courses ⚷130

Whatever excess water the foreign water of Owens Creek contained which had not been previously appropriated, belongs to the estate, and would be open to appropriation by defendants or any other persons in accordance with the provisions of the statute, and assumption that such excess water belonged to the plaintiffs was erroneous. Water Code, § 1201.

3. Waters and water courses ⚷152(11)

Where defendants' rights to excess foreign water of Owens Creek as distinguished from their riparian rights were not involved or determined in prior actions, judgments in such actions were not res judicata of that particular issue in subsequent action.

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* Subsequent opinion 223 P.2d 209.

4. Waters and water courses ⚷152(11)

Where neither the findings nor the decrees determined the unit flow or quantity of water in Owens Creek, with or without the presence of foreign water, or the relative proportions of the excess water over and above the quantity of foreign water required by the plaintiffs for necessary or beneficial use, decrees restraining the defendants from diverting any foreign water from Owens Creek to which their lands were riparian were uncertain and unenforcible because it was impossible to determine when the plaintiff's prior rights were invaded.

◆

Melvin, Faulkner, Sheehan & Wiseman, San Francisco and Fred B. Wood, San Francisco, Cal., for plaintiffs-respondents.

Athearn, Chandler & Farmer, Hoffman & Angell San Francisco, Cal., for defendants-appellants.

THOMPSON, Justice.

The defendants in the above consolidated cases have appealed from judgments restraining them from diverting "any foreign water" from Owens Creek in Merced County, to which their lands are riparian. The injunction permits defendants to divert from the "natural flow" of Owens Creek the quantity of water necessarily and beneficially used upon their riparian lands, but prohibits the diversion of any foreign water flowing therein which is derived from the Marced River or any of its tributaries, or from the Merced Irrigation District canals or ditches.

Owens Creek is a natural watercourse having its source in the mountains in the easterly portion of Merced County and running thence westerly to and through the Merced Irrigation District to its junction with Bear Creek. The East Side Canal extends several miles westerly of Owens Creek at the point where the defendants' lands are riparian thereto. Merced River has its source in the Sierra Nevadas and runs westerly to its confluence with the San Joaquin River.

East Side Canal extends from the San Joaquin River in a northerly direction, across Bear Creek, Owens Creek and other streams referred to in the pleadings. Plaintiffs own and operate the East Side Canal for public utility purposes. It supplies water for irrigation to the owners of some 8,000 acres of land in Merced and Stanislaus Counties. The Stevinson Water District, which owns and operates East Side Canal, was organized under the California Water District Act, Gen. Laws, Act 9125, and is operated as such. By agreement executed between the parties in October, 1929, the East Side Canal Company secured a large quantity of water from the Merced Irrigation District. During seasons when there is an excess of water beyond the quantity which East Side Canal is able to handle, said excess water is released "by means of several spills on the west side of said East Side Canal and by means of a siphon under said canal at a point where Owens Creek intersects the said East Side Canal." The respondents claim, and the court found, that such water and other excess water, derived from their operation of pumping apparatus, and dumped into the channel of Owens Creek, is "foreign water" to which the defendants have acquired no riparian rights. But the court failed to find what quantity of water was thus conveyed from sources outside the watershed of Owens Creek into or through that natural channel. Nor did the court determine the quantity of the natural flow of Owens Creek at any period of the year, or at all. If we assume that the water derived from sources outside of the Owens Creek watershed, but which are conveyed into that natural channel is foreign water to which the defendants could acquire no riparian rights, it is impossible to distinguish between the water of Owens Creek which belongs to its natural flow, and such so-called foreign water, for the reason that it commingles and flows in one and the same stream. There is absolutely no finding which determines the natural flow of Owens Creek with or without the presence of such foreign water, or the quantity of the natural flow of that stream to which the riparian rights of the defendants attach. It would therefore seem that the findings and injunction are inadequate and ineffectual, since it is impossible to determine when defendants have exceeded their riparian rights or have invaded the claim of the respondents' appropriated rights by diverting from the stream any portion of the foreign water flowing therein.

[1] This action is in the nature of a suit for the apportioning of the water of Owens Creek between the defendants, whose lands are riparian to that stream, and the respondents, who claim as statutory appropriators. The burden was on the plaintiffs to definitely show the quantity of water flowing in Owens Creek to which they claim superior rights by appropriation or otherwise.

The appellants concede that their riparian rights to the use of water flowing in Owens Creek do not attach as such to the "foreign water" therein which is derived from Merced River, or the water secured from sources beyond the Owens Creek watershed which is drained into and augments the natural flow of that stream. Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049; E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417, 419; 25 Cal.Jur. 1104, sec. 111. In the Horst Company case, supra, the court quoted with approval from Gallatin v. Corning Irrigation Co., 163 Cal. 405, 126 P. 864, Ann.Cas.1914A, 74, in that regard, as follows: "'These decisions in effect establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will, by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes "parcel" of his land, within the meaning of the law of riparian rights.'"

But the appellants in this case do assert that the findings and judgment in this case are fatally defective and ineffectual because the injunction prohibits them from acquiring by appropriation or otherwise any portion of said foreign water and the injunction prohibits them from diverting any portion thereof notwithstanding the fact that they actually filed their application for permission to appropriate a definite, necessary and beneficial portion thereof pursuant to Section 11 of the California Water Commission Act, Stats. of 1913, pp. 1012, 1017, 2 Deering's Gen. Laws of 1937, pp. 4229, 4236, Act 9091, since the findings fail to determine what portion plaintiffs require, as necessary or beneficial to their rights, and that, in effect, the court awards plaintiffs all of said foreign water. Section 1201 of the Water Code provides that: "All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."

The findings determine that at least a portion of the foreign water which was discharged from the Merced River into Owens Creek was excess water not required by plaintiffs for irrigation of the lands served by their system.

In recognition of the fact that the foreign water which was drained from Merced Irrigation District into Owens Creek included an excess of water beyond that which was required by plaintiffs for beneficial use, the court determined in Finding Number XXIII that: "During periods of heavy run-off of water in the Sierra Nevada Mountains and during periods when the quantity of water in the irrigating system of Merced Irrigation District *exceeds the requirements of consumers* of said district the amount of water delivered to plaintiffs at the western boundary of Merced Irrigation District exceeds the capacity of said East Side Canal. At such times, plaintiff East Side Canal & Irrigation Company is required to and does release said *excess water*." (Italics added.)

[2] The court failed to find what quantity or proportion of said foreign water was excess water not required by plaintiffs for beneficial use. It is apparent that whatever excess water the foreign water of Owens Creek contained, which had not been previously appropriated, under Section 1201 of the Water Code belongs to the State and would be open to appropriation by the defendants or any other person in accordance with the provisions of the statute. Yet the court erroneously assumed such excess water belonged to plaintiffs and restrained the defendants from diverting any portion of it.

[3] It is true that respondents had acquired certain rights to the water of Owens Creek by appropriation. Permit No. 5726, which was granted April 1, 1941, gave them the right to divert, from March 1st to November 1st of each year *not to exceed* 163 cubic feet per second from that stream to make up a deficiency of that maximum quantity of water, when said deficiency existed in Bear Creek. In other words, plaintiffs were entitled to 163 cubic feet per second from the flow of Bear Creek, and when Bear Creek furnished them with less than that amount, they were entitled to make up the deficiency from Owens Creek. Permit No. 5729, also issued on the last-mentioned date, gave plaintiffs the right to divert from Owens Creek, from March 1st to November 1st of each year, 40 cubic feet of water per second, provided that the total amount of water diverted from the sources set forth in the approved application should not exceed 163 cubic feet per second. Apparently those permits attached not only to the natural flow of the water of Owens Creek, but also to any foreign water which was flowing therein to the extent only that it was necessary and beneficial. The respondent East Side Canal Company was the owner of and entitled to prior rights under Permit No. 5733 to divert from the natural flow or foreign water in Owens Creek 40 cubic feet of water per second, from January 1st to December 31st of each year, provided, however, that the total quantity of water so diverted from the sources set forth in the application should not exceed the maximum of 160 cubic feet per second. Plaintiffs also acquired certain water rights in Owens Creek, in water dumped therein from Merced River by virtue of an agreement dated October 29, 1929, between the James J. Stevinson Corporation and Merced Irrigation District, to which the defendants were not parties. By the terms of that agreement, the Merced Irrigation District conveyed to the James Stevinson Corporation 24,000 acre feet of water per annum, plus ten per cent additional to replace anticipated loss from seepage and evaporation, to be delivered between April and September of each year, in consideration of the Stevinson Corporation's consent that the former should exercise an easement to take additional water from Merced River, to which right there was a dispute between the parties. The aforesaid prior appropriated rights and said contractual rights were ratified and approved in the decrees which were rendered by the Superior Court in Merced County, in three suits involving water rights between plaintiffs and George S. Bloss, Jr., et al., Numbered 8919, 8960 and 8964. The appellants in these cases were substituted for John Doe defendants in two of those cases. But their rights to excess foreign water of Owens Creek, as distinguished from their riparian rights, were not involved or determined in those cases. We think the judgments in those cases are not res judicata of that particular issue in this suit.

[4] Since neither the findings which were adopted in these cases nor the decrees determine the unit flow or quantity of water in Owens Creek, with or without the presence of foreign water, or the relative proportions of the excess water over and above the quantity of said foreign water required by plaintiffs for necessary or beneficial use, the decrees are uncertain and the injunctions are unenforcible because it is impossible to determine when the plaintiffs' prior rights are invaded.

The case of Bloss v. Rahilly, supra [16 Cal.2d 70, 104 P.2d 1050], upon which the respondents rely, appears to determine this issue of uncertainty of the findings and decree adversely to their contention. That was a suit to determine the respective rights of a riparian owner of land bordering on Duck Creek in Merced County and the rights of lower appropriators of water in that creek, including the rights to foreign water which was mingled and flowing with the natural water therein. The court determined that plaintiff, Bloss, was entitled to "all the rights of a riparian owner with respect to said creek; that he was also the owner of the right to appropriate *20 cubic feet of water per second* of the water of said creek for the irrigation of his lands; that defendants herein, Mamie F. Rahilly and Peter Rahilly Jr., owned certain lands riparian to Duck creek and were entitled to all the rights of riparian owners but that none of their riparian rights extended to any water in said creek which had its origin in the Merced river". (Italics added.) Regarding plaintiff's right to a portion of the foreign water in Duck Creek, the Supreme Court said: "* * * It [the trial court] further decreed that 'plaintiff is the owner of the right to take, divert and appropriate *twenty cubic feet per second* of the foreign water flowing in said creek, referred to and described in the complaint and answers herein, but that defendants have no right, title, interest or estate of, in or to any of the foreign water flowing in said creek.'" (Italics added.)

Judgment was rendered accordingly. That judgment was affirmed on appeal for the expressed reason that the proportion of the *foreign water* to which the plaintiff was entitled was definitely and specifically stated by the court, in its decree, to be "twenty cubic feet per second." There was no evidence that plaintiff took more than his designated lawful proportion or quantity of the foreign water in Duck Creek. The clear inference from the language of the Supreme Court is that if the trial court had failed to ascertain and determine the definite amount of the foreign water to which plaintiff was entitled it would have been necessary to reverse the judgment for uncertainty and indefiniteness. The issue in that case with respect to the rights to the foreign water was almost exactly the same as that which is presented in this suit. The Supreme Court said in that regard: "The final contention of defendants is that, 'The judgment is uncertain and insufficient.' * * * They state that, 'From the judgment it is impossible to determine when the foreign waters begin to flow, in what quantities they flow, what particular waters they include or what portion of the stream can be attributed to natural flow.' We do not believe it was either necessary or possible for the court to adjudicate these matters. The judgment *decreed with certainty* that plaintiff was the owner of the right *to appropriate twenty second feet of the foreign water flowing in said creek.* It is entirely apparent from the facts above set forth that the foreign flow, as well as the natural flow, was and is variable. Obviously, when there is less than twenty second feet of foreign water in said stream, plaintiff's right to appropriate then extends only to such foreign water as may be present. The claimed difficulty which defendants may have in determining what amount of water they may take at any given time by virtue of their riparian rights is a difficulty inherent in the nature of the flow of this stream and *is not a difficulty caused by any deficiency in the provisions of the judgment. In our opinion, the judgment was as definite and certain as it could be made under the circumstances.*" (Italics added.)

Applying that case to the same issue which is presented on this appeal, it seems to be clear that, in the absence of any finding or decree determining the maximum quantity of foreign water in Owens Creek to which either the plaintiffs or defendants are entitled, or the relative proportions thereof to which they are entitled, or the unit flow of the creek with or without the foreign water, it is impossible to decide when the rights of the respondents in this case shall have been invaded. It follows that the findings and judgments in these cases are inadequate and uncertain, and the judgments must therefore be reversed on that account.

The judgments are reversed.

ADAMS, P. J., and PEEK, J., concur.

94 Cal.App.2d 715

MERRY v. KNUDSEN CREAMERY CO. et al.

Civ. 17256.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1949.

Rehearing Denied Dec. 19, 1949.

Hearing Denied Jan. 19, 1950.

Action by Thomas M. Merry against the Knudsen Creamery Company and against Glenn I. Brunk for damages from collision of truck owned by the defendant Creamery Company and operated by the defendant Brunk with the rear of the plaintiff's automobile while the latter was stopped at an intersection in obedience to traffic light.

From a judgment of the Superior Court of Los Angeles County, Walter H. Odemar, J., in favor of the defendants the plaintiff appealed.

The District Court of Appeal, White, P. J., reversed the judgment and remanded the case for new trial on the ground that instructions which precluded recovery from the Creamery Company alone were prejudicial.

1. Negligence 🔑63

The terms "unavoidable" or "inevitable" denote an accident not proximately caused by negligence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Inevitable" and "Unavoidable".

2. Automobiles 🔑246(57)

In action for damages from collision of truck with rear of automobile which had stopped for traffic light, where it could be inferred from testimony of truck driver that brakes, although tested and checked by owner the night before accident, failed completely and without warning after operating satisfactorily for several miles immediately preceding the accident, instruction on unavoidable accident was proper. Vehicle Code, § 670(a).

3. Trial 🔑241

In action for damages from collision of truck with automobile which had stopped for traffic light, instruction that the fact that accident happened was not evidence of negligence was not improper where followed by an instruction in language of statute relating to adequate brakes, and by a statement that a violation of the statute required a presumption of negligence which could be overcome by a showing that conduct in question was excusable. Vehicle Code, § 670(a).

4. Automobiles 🔑193(1)

Owner of vehicle who knowingly or negligently permits it to be operated by agent upon public highway in defective condition is liable for damages resulting from such condition whether his agent knows of its defective condition or not.

5. Automobiles 🔑200, 246(39)

Where truck collided with rear of automobile which had stopped for traffic light and driver of truck testified that his brakes had failed to hold and that slack therein which he had reported to owner the preceding evening had been adjusted, negligence on part of truck owner alone could have been inferred from the unexplained failure of the brakes, so that where automobile owner charged negligence on part of truck owner and driver in general terms, instructions requiring verdict against or in favor of both truck owner and driver were improper. Vehicle Code, § 670(a).

6. Negligence 🔑121(2)

"Res ipsa loquitur" merely means that circumstances of particular accident justify an inference of negligence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Ipsa Loquitur".

7. Automobiles 🔑242(2)

Res ipsa loquitur doctrine was applicable to collision of truck with rear of automobile which had stopped for traffic light.

8. Automobiles 🔑242(3)

In action for damages from collision of truck with rear of automobile which had stopped for traffic light, defense disclosed by truck driver's deposition, that brakes had failed, placed upon truck owner the burden of overcoming presumption arising from violation of statute requiring adequate brakes. Code Civ.Proc. § 2055.

William K. Young, Los Angeles, for appellant.

Reginald I. Bauder and W. I. Gilbert, Jr., Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondents.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment for defendants entered upon the verdict of a jury in an action for damages for personal injuries arising from an automobile accident.

On the morning of September 2, 1947, plaintiff, who was driving his automobile southerly on Western Avenue in the City of Los Angeles, approached the intersection of 54th Street, where traffic signals were in operation. The signal changed to "Stop" for traffic on Western Avenue, and plaintiff halted his automobile behind several other vehicles in the traffic lane adjacent to cars parked along the west curb of Western Avenue. Within a short interval, from "a second or two" to "half a minute", a truck owned by defendant Knudsen Creamery Company, and operated by defendant Glenn I. Brunk struck the rear of plaintiff's car, driving it into the car ahead.

Defendant truck driver testified that he was following plaintiff's car and applied his brakes when he was about 50 feet behind plaintiff's car and traveling between 25 and 30 miles per hour; that at first the brakes took effect, but that as he continued to push down on the brake pedal, "it just kept going down and kept going out the more I pushed on it." It was not shown by the evidence precisely what was the difficulty with the brakes. The defendant driver testified that on the evening before the day of the accident he observed a slight slack in the brake pedal, reported it, and it was adjusted on the night before the accident. On the morning of September 22, he drove the truck from 21st and Santee Streets to 21st and Broadway, thence down Broadway to Santa Barbara, thence west on Santa Barbara to Western, and south on Western to the scene of the accident; that during that time he experienced no difficulty with the truck's hydraulic brakes. With respect to the action of the brakes immediately before the accident, he testified that he first discovered that the brakes were not going to hold when he tried to stop behind the plaintiff's car and was forty to fifty feet behind the same. He saw plaintiff's car being brought to a stop and slowed his vehicle from 25 to 30 miles per hour to about 15 to 20 miles per hour, at which time the brakes failed completely.

Appellant assigns as grounds for reversal the following: "(1) The court erroneously instructed the jury that the fact the accident happened was not evidence of negligence. (2) "The court erred in instructing the jury respecting an unavoidable accident." (3) "The evidence was insufficient to justify the verdict."

The court instructed the jury in part as follows:

"While there are two defendants in this action, one of them, Knudsen Creamery Company, has been sued herein because, as has been established, it was the principal for whom the other defendant, Glenn I. Brunk, was acting as agent, and within the scope of his authority at the time of the events out of which the accident occurred. It follows, therefore, that if one is liable, both are liable. * * * It has been established that the defendant Glenn I. Brunk was acting as agent for said corporation and within the scope of his authority at the time of the events out of which the accident involved in this case occurred. Hence your verdict must be the same as to both said defendants, either in favor of both or against both in one sum.

"* * * The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

The court then read to the jury section 670(a) of the Vehicle Code, which provides that no person shall operate on any highway a vehicle unless such vehicle be equipped with brakes adequate to bring the vehicle to a stop within specified distances at specified speeds, and instructed the jury as follows:

"Conduct which is in violation of Section 670a of the Vehicle Code of the State of California just read to you constitutes negligence per se. This means that if the evidence supports a finding and you do find that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes not of his own intended making induce him, without moral fault, to do otherwise."

The record further discloses that after the jurors had deliberated for about an hour and a half, they returned into court, whereupon, in the absence of counsel, the following discussion took place:

"The Court: Ladies and gentlemen, I have been handed a question from Mr. Glenn H. Lyle, a member of the jury, which states as follows: 'If the defendant's driver, Brunk, was himself not negligent, must we bring in a verdict for the defendant?'

"Pursuant to the instructions given to you that when there is a principal and an agent in operation of a series of events, an action is filed as it is in this instance against both the principal and the agent, the principal in this event being Knudsen Creamery Company, the agent in this event being Mr. Brunk, the defendant, it is your duty should you find that there was negligence and that as a result of that negligence and the proximate—and from the proximate cause thereof—that is, the negligence proximately caused the accident, then you are instructed that you are to bring a verdict against both defendants, that the agent and the principal in this particular matter are negligent, if you should find that there is negligence. Mr. Lyle, does that answer your question?

"Mr. Lyle: It does to me.

"Juror No. 5: If one of them is negligent and the other is not—if we find that one is negligent and the other is not, do we clear them both?

"The Court: Under the instructions herein it would be impossible for you to find that the accident occurred from the negligence of merely one; if there was negligence in this instance it was the negligence of the agent as well as the principal, not only the principal or only the agent.

"Another Juror: Your Honor, maybe I am asking this question out of turn; this question is not the question under discussion, but is this—

"The Court: (Interrupting) Well, I don't think I can go into the discussion with you. I would like very much to, but you will notice that counsel are absent here and they have stipulated that should the jury desire further instructions we could do so without their presence; however, I do not feel that it would be right for me to listen to the discussion had or any part of it by you in the jury room at this time. However, you are instructed—and you must follow the instructions of the Court—that if one is negligent in this instance that both are negligent, or if they both are not negligent, neither one is negligent."

The court then reread the instructions hereinbefore quoted in part concerning the principal and agent relationship between the driver and the creamery company. Thereupon the following took place:

"Juror No. 2: This question probably might clear it up: Mr. Brunk is not sued in the action with Knudsen Dairy, is that correct?

"The Court: No, both are sued; both are defendants. The action is by Mr. Merry against Knudsen Creamery Company and Glenn I. Brunk, both being defendants, and if the judgment is against one, it shall be against both. Do you have a question?

"Juror No. 1: Well, no, I had in mind to ask you to read that portion of your charge there referring to the law on an unavoidable accident."

The court then reread the instruction on unavoidable accident and the jury resumed its deliberations.

[1, 2] It was not error to give an instruction on the subject of unavoidable accident. As stated in the instruction itself, the terms "unavoidable" or "inevitable" simply denote an accident not proximately caused by negligence. See Polk v. City of Los Angeles, 26 Cal.2d 519, 542, 543, 159 P.2d 931. Under the testimony of the defendant driver it could be inferred that the brakes, although tested and checked the night before the accident, failed completely and without warning after operating satisfactorily for several miles immediately preceding the accident. See also Smith v. Hale, 3 Cal.App.2d 277, 278, 279, 39 P.2d 445; Graham v. Consolidated Motor Transport Co., 112 Cal.App. 648, 651, 297 P. 617.

[3] Neither of the two instructions complained of can be held to be improper, under the circumstances presented by this case, in view of the fact that these instructions were immediately followed by an instruction in the language of 670(a) of the Vehicle Code concerning the requirement of adequate brakes, and the jury were told that a violation of the section requires a presumption of negligence which could be overcome by a showing that the conduct in question was excusable.

We are, however, of the view that under the facts disclosed by the evidence in the case, prejudicial error was committed in advising the jury when it returned into court for further instructions. The jury was told that there could be no verdict against the owner of the truck and in favor of the driver. They were told that unless the driver was negligent there could be no liability on the part of the creamery—in other words that they could hold the creamery company liable only on the theory that it was responsible for the acts of its agent, the driver. It is obvious from the colloquy between court and jury hereinabove quoted that the jury considered the driver to be free from negligence, or at least desired to exonerate him. The jury were thus precluded from basing a verdict upon a finding that, although the driver acted as a reasonably prudent man in reporting the slack in the brakes and in relying upon the fact that they had been adjusted and appeared to be in good order the following morning and functioned normally up to the time of the accident—that nevertheless the owner of the truck had failed to meet or overcome the presumption of negligence on his part arising under section 670(a) of the Vehicle Code.

The complaint in this case charged negligence on the part of defendants in general terms. The defense was a denial of negligence. The deposition of the defendant driver was taken under section 2055 of the Code of Civil Procedure and offered in evidence by the plaintiff. His testimony in the deposition was adopted as part of the defendant's case. In addition to the testimony on deposition, the driver testified, for the defense, that he reported the slack in the brake pedal and "they" adjusted it that night (the night before the accident); that he had no further difficulty until the time of the accident. The defense offered no further testimony in explanation of the failure of the brakes, nor did they offer any testimony to show that the failure occurred despite the exercise of due care on the part of the owner and his employees.

From the testimony of the defendant driver it could be concluded that he did all that he was reasonably required to do and was free from negligence. When he noticed a slack in the brakes, he reported it and "they took the slack out and adjusted them." This occurred the night before the accident. On the morning of the accident the brakes appeared to be in good working order. Nevertheless, they failed without warning. The obvious inference from this set of circumstances is that the negligence, if any, was the negligence of the person charged with the duty of inspecting and repairing the brakes.

[4] It is self-evident that the owner of a vehicle who knowingly or negligently permits it to be operated upon a public highway in a defective condition is liable for damages resulting from such condition, whether his agent in the operation knows of its defective condition or not. In other words, as might be concluded in this case, the driver was but an innocent instrumentality in operating the defective vehicle for his employer, whose responsibility if any arises through his failure, either personally or through an employee or agent, to exercise due care to see that the brakes on the vehicle were in the condition required by section 670(a) of the Vehicle Code.

[5] Upon this state of the record, the jury would have been warranted in drawing an inference of negligence from the unexplained failure of the brakes or in indulging the presumption of negligence for failure to comply with section 670(a) of the Vehicle Code, and in concluding further that the defendant owner of the truck had failed to present facts to overcome the inference or presumption. As above noted, beyond the testimony of the driver, no attempt was made to show what precautions had been taken in the maintenance of the vehicle. Whoever adjusted the brakes on the night before the accident was not called as a witness. It follows that a verdict against the creamery company alone could have been fully warranted, and it was error to instruct the jury that its verdict had to be against both the company and the driver or in favor of both.

[6, 7] In many cases it has been held that a collision between a moving automobile and a standing automobile, whether a parked vehicle or one momentarily at a standstill, calls for the application of the doctrine of res ipsa loquitur. Bauhofer v. Crawford, 16 Cal.App. 676, 117 P. 931; Slappey v. Schiller, 116 Cal.App. 274, 2 P.2d 577; Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094. See also authorities collected in 151 A.L.R. 878. To apply the rule is simply to say that the circumstances of the particular accident justify an inference of negligence. Such a case was here presented.

[8] The plaintiff charged negligence in general terms. The defense disclosed by the driver's deposition was that the brakes failed. This defense in turn placed upon the defendant the burden of overcoming the presumption arising from a violation of section 670(a) of the Vehicle Code. "Proof having been made that the collision was occasioned by the defective condition of the party's vehicle, the issue as to his responsibility for the happening of the calamity depends upon the showing as to whether he knew or ought to have known of the existence of the defect." Whitechat v. Guyette, 19 Cal.2d 428, 436, 437, 122 P.2d 47, 52, quoting 2 Cal.Jur. Ten-Year Supp., sec. 157, p. 234. To the same effect, see Cavagnaro v. City of Napa, 86 Cal.App.2d 517, 528, 195 P.2d 25, and Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279, 283. Quoting from the latter case:

"And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. (Citing cases.)

"However, in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation. The rule has been aptly stated in Jolley v. Clemens, 28 Cal.App.2d 55, 67, 82 P.2d 51 [58], where it was said (quoting from 1 Shearman & Redfield on Negligence, § 13): '"* * * violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive * * *". Continuing, the court said: 'But unless and until justification or excuse for such conduct appear * * * the general rule applies and it must be treated as negligence per se.' "

The judgment is reversed, and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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94 Cal.App.2d 885

PEOPLE v McDONNEL.

Cr. 2151.

District Court of Appeal, Third District, California.

Dec. 1, 1949.

John McDonnel was charged with an assault with a deadly weapon with intent to kill.

The Superior Court of Humboldt County, Delos A. Mace, J., rendered judgment on a verdict finding defendant guilty of lesser offense of assault with a deadly weapon and he appealed.

The District Court of Appeal, Thompson, J., held that the evidence sustained conviction and that no reversible error occurred in the giving or refusing of instructions and affirmed the judgment.

1. Assault and battery 🔑92

Evidence sustained conviction of assault with a deadly weapon, as against contention that defendant fired in self-defense.

2. Homicide 🔑276

In prosecution for assault with a deadly weapon with intent to kill, whether defendant armed with a revolver and standing at the foot of stairway near front door from which he could easily escape was justified in believing that he was then threatened with imminent danger so as to justify use of a deadly weapon in necessary self-defense against victim and companions who stood unarmed at head of stairway was a question for jury.

3. Homicide 🔑113

A person who seeks or instigates a quarrel with another must, in good faith, first desist or retire from the affray, before he will be justified in the use of a deadly weapon in self-defense, or in using force and violence against his adversary.

4. Criminal law 🔑829(16)

Where court fully charged the rule to be followed in determining credibility and weight of testimony of all witnesses alike, refusal to give requested instruction that defendant had testified in his own behalf and that his credibility and the weight of his evidence should be determined in the same manner applicable to any other witness was not reversible error.

5. Criminal law 🔑811(5)

Court should not single out a particular witness and charge jury how his testimony should be considered.

◆

Chester Monette, Eureka, for appellant.

Fred N. Howser, Attorney General, Gail A. Strader, Deputy Attorney General, for respondent.

THOMPSON, Justice.

The defendant was charged with an assault with a deadly weapon, towit, a loaded revolver, with intent to kill Tommy Young. He was tried with a jury and convicted of the lesser offense of assault with a deadly weapon. From the judgment which was rendered accordingly this appeal was perfected.

The appellant contends that the verdict and judgment are not supported by the evidence; that he went with two companions to a Negro Christmas night celebration to try to identify a Negro who his companion Albro said had previously beaten him; that Tommy Young was the aggressor in an affray which ensued, and that he [the defendant] shot him in what he believed to be necessary self-defense to prevent imminent bodily harm. It is also insisted the court erred in giving to the jury and in refusing to give certain instructions.

Mr. and Mrs. Burks were entertaining some friends in their rooms in the upper story of an apartment house in Eureka, on Christmas night. The hosts and guests were Negroes. The defendant and his companions were white people. The defendant was acquainted with Mr. Burks, having previously worked with him in a Eureka foundry. Upon that Christmas night the defendant met his friend Albro, who was then disheveled and intoxicated. His clothes were torn and muddy. He told the defendant he had been beaten by a Negro, and asked the defendant to go with him to the Burks' Christmas celebration to see if they could find the man who assaulted him. The defendant consented to do so, and arming himself with his revolver they met and persuaded another companion by the name of Van Cleve to accompany them. The three men proceeded to the apartment house where the Burks' party was being held. They arrived shortly before midnight, and entering the front door they climbed a flight of twenty-six stairs to the second story upon which the Burks' rooms were located. They rapped at the door, and when Mr. Burks appeared the defendant told him his friend Albro had been beaten by a Negro, and said they wanted to see if that man was there. Burks told him he didn't know anything about the affair; that they were having a little Christmas party, and did not want any trouble. He requested the defendant and his companions to leave them alone and to go away. But when the defendant and his associates insisted on seeing the Negro guests, Burks called them from the room. Ten or a dozen of them came trooping out into the hallway and stood in a group upon the landing at the head of the stairway. Tommy Young was among them. The defendant, evidently being surprised at the large number of guests who came swarming out of the room, decided that "discretion was the better part of valor", and saying "We don't want any trouble, let's go," hastily ran down the stairs to a safe place near the bottom, where he stopped and turned around. The defendant claimed that Young shoved him downstairs, but several witnesses denied that statement. The defendant asserted that Young followed him part way down the stairway, and that he threatened him with bodily harm. But that statement was denied by Young and several other witnesses. Young testified that he put his hand on the shoulder of Van Cleve, a very tall and large man, as he stood at the head of the stairway, and told him they were having a Christmas party and didn't want any trouble, and that he asked the defendant and his companions to go away and to leave them alone. Van Cleve claimed that Young shoved him down the stairway. In any event Van Cleve and Albro proceeded to follow the defendant down the stairway. Young stood at the head of the stairway with one leg thrown over the bannister. None of the Negroes were armed, and none of them threatened the defendant or his companions with harm. There was no demonstration or effort on the part of Young or the other Negroes to follow them downstairs.

Suddenly, without warning, the defendant, who stood in a safe place near the bottom of the stairs, drew his revolver and shot Mr. Young in the leg. The defendant and his companions immediately fled through the front door and disappeared. Young was seriously injured and was taken to a hospital for medical treatment. The defendant was subsequently arrested and charged with the crime as previously stated.

If we assume that the foregoing circumstances constituted an affray, it was the sole province of the jury to determine who the aggressor was in that affray.

[1, 2] We are satisfied the evidence amply supports the verdict and judgment convicting the defendant of the lesser offense of an assault with a deadly weapon. There appears to have been no sufficient provocation or justification for the shooting of Mr. Young or any other person involved in that affair. The defendant deliberately armed himself with his revolver and went with two companions to that Christmas party, seeking some unknown Negro who Albro said had previously assaulted him. The Negro guests were called from the reception room at the request of the defendant. None of the Negroes were

armed, and none of them attempted to attack the defendant or his companions, nor did they threaten to do so. They were not pursuing the defendant down the stairway. Mr. Young stationed himself at the top of the stairway where he stood unarmed, with his leg thrown over the bannister. The defendant occupied a safe position at the bottom of the stairway near the front door, through which he could have easily escaped to absolute safety if he had been threatened with bodily harm. There is an abundance of evidence that no such harm was threatened. The circumstances would not warrant the defendant in believing as a reasonable man that he was then in imminent danger of receiving great bodily harm. The question of whether the defendant, as a reasonable man, was justified in believing, under the circumstances of this case, that he was then threatened with imminent danger so as to justify the use of a deadly weapon in necessary self-defense is a problem for the sole determination of the jury. People v. Zuckerman, 56 Cal.App.2d 366, 374, 132 P.2d 545. The implied finding of the jury upon that issue was adverse to the contention of the defendant. With that conclusion we may not interfere, in view of the record in this case. Certainly Young was not the aggressor in that alleged affray between himself and the defendant.

[3] The court properly instructed the jury that a person who seeks or instigates a quarrel with another person must, in good faith, first desist or retire from the affray, before he will be justified in the use of a deadly weapon in self-defense, or in using force and violence against his adversary. People v. Holt, 25 Cal.2d 59, 66, 153 P.2d 21. Moreover, the court gave to the jury the following instruction favorable to the defendant upon that identical principle: "It is lawful for a person who is being assaulted and who has reasonable grounds for believing that bodily injury is about to be inflicted upon him to stand his ground and defend himself from such attack; and in so doing, he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person in the same or similar circumstances to be necessary to prevent the injury which appears to be imminent. A person who has been attacked and who is exercising his right of lawful self-defense is not required to retreat and he not only may stand his ground and defend himself against the attack but may also pursue his assailant until he has secured himself from danger, if that course appears to him and would appear to a reasonable person in the same situation to be reasonably and apparently necessary; and this is his right, even though he might have gained safety by withdrawing from the scene."

[4, 5] It did not constitute reversible error for the court to refuse to give defendant's proposed instruction to the effect that he had testified in his own behalf and that his credibility and the weight of his evidence should be determined by the jury in the same manner applicable to any other witness. The court elsewhere fully charged the jury with respect to the rule to be followed in determining the credibility and weight of the testimony of each and all witnesses alike. It has been repeatedly held to be improper for the court to single out a particular witness and to charge the jury how his evidence should be considered. People v. Barnett, 99 Cal.App. 409, 416, 278 P. 885; People v. Young, 88 Cal.App.2d 129, 134, 198 P.2d 384; People v. Jeans, 79 Cal.App. 464, 249 P. 1089; People v. Jackson, 63 Cal.App.2d 586, 595, 147 P.2d 94; 8 Cal.Jur. 356, sec. 394. That instruction was properly rejected.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

94 Cal.App.2d 878

VENZA v. VENZA et al.

Civ. 7641.

Sac. 6001.

District Court of Appeal, Third District, California.

Dec. 1, 1949.

Action by Madeline P. Venza against Joseph J. Venza and others, copartners doing business under the name and style of California Sunset Products Company and Joseph Venza, Inc., a corporation seeking an accounting and equitable division of the community assets after plaintiff had been granted an interlocutory decree of divorce.

The Superior Court for Merced County, H. S. Shaffer, J., entered an order appointing a receiver and enjoining defendants from interfering with his possession, and defendants appealed.

The District Court of Appeal, Adams, P. J., affirmed the order holding that defendants could not complain of appointment of the receiver for the first time on appeal and that there was no abuse of discretion in appointing the receiver.

1. Receivers 🔑35(1)

A receiver may be appointed ex parte without notice upon application therefor and a showing that without such appointment, irreparable injury will unquestionably result before the matter can be heard on notice.

2. Appeal and error 🔑190(3)

Where plaintiff granted an interlocutory decree of divorce entered into a property settlement and alleged that defendant had concealed large sums properly belonging to the community estate and the trial court appointed a receiver with consent of the parties and defendant did not ask for a continuance and it did not appear that any miscarriage of justice resulted, claim of defendants that appointment of receiver was error could not be made for the first time on appeal.

3. Appeal and error 🔑955
Receivers 🔑8

The appointment of a receiver is discretionary and action of the lower court in appointing a receiver will not be disturbed in absence of a showing of abuse of discretion.

4. Receivers 🔑30, 35(1)

An order for appointment of receiver may be made without notice and without any previous request by either party.

5. Receivers 🔑8

Where plaintiff obtained an interlocutory decree of divorce, entered into a property settlement with defendant, and subsequently alleged that defendant had concealed large sums of money properly belonging to the community estate and plaintiff sought an accounting and an equitable division of the community assets, appointment of a receiver in order to keep a valuable business of the parties operating was not an abuse of discretion.

Preston, Braucht & George, Merced, for appellants.

C. Ray Robinson, Merced, for respondent.

ADAMS, Presiding Justice.

The complaint in this action alleged that plaintiff, Madeline P. Venza, and defendant Joseph J. Venza lived together from April 17, 1941, to March 5, 1945, under an agreement to pool their resources and efforts, and to share equally in their joint accumulations; that they accumulated property known as the Cannery which when acquired was of little value; that after its acquisition plaintiff devoted all her time working toward the development of same into a successful business, and through the joint efforts of the parties same rapidly increased in value until, on March 27, 1947, it, with its assets and equipment, was worth $200,000; that on March 5, 1945, the parties were married, but on March 24, 1947, they entered into a property settlement, and on March 28, 1947, plaintiff was granted an interlocutory decree of divorce from defendant, the settlement agreement being adopted by the trial court and made a part of the said decree; that prior to said decree defendant had told her that she had no further interest in the cannery, all of her interests therein having been merged with his; that relying upon the statements of defendant she was induced to enter into the property settlement; that defendant had concealed from plaintiff the amounts of income received from their joint efforts and the value of their assets, and that because of the fraudulent concealment by defendant she had been deprived of great sums of money; that defendant was still in possession of and operating the cannery and its equipment, and had in his possession large sums of money, accounts receivable, etc., which properly belong to the community estate of plaintiff and defendant. An accounting by defendant was prayed, and an equitable division of the community assets.

After the filing of the complaint, an affidavit of plaintiff's attorney was filed in which it was averred that defendants had in their possession various products of the cannery in which plaintiff claimed a share, and that defendants would, during the current packing season, pack various agricultural products, and that they were negotiating for the sale of such assets and would sell them unless enjoined.

On October 2, 1948, an order to show cause and temporary restraining order were issued by the court. Defendants, on October 6th, filed a notice of motion for dissolution of the restraining order, or for the furnishing by plaintiff of an undertaking in the sum of $500,000 as a condition of its continuance.

Hearing on said motion was had on October 7, 1948, during which Mr. Venza testified, after which, in the presence of counsel for all parties, the following colloquy was had.

"The Court: What would be the objection to having a receiver appointed and keep the business rolling just as it now is?"

Mr. Hawkins, the attorney for Mrs. Venza, agreed, stating that since it was contended by plaintiff that she had been defrauded out of her proportion of the community property, that defendant Venza had concealed certain assets, and that she had joined in a property settlement by reason of fraud, and that certain products of the cannery were all of his visible assets, it was inequitable that she should be required to put up a bond of $500,000 or any bond. The court then said:

"No, but I would like to have a reply to my original question as to what would be the objection to a receiver? It would be fair to both of you certainly.

"Mr. Hawkins: We have no objection whatsoever. As a matter of fact, it is the suggestion of the plaintiff that a receiver be appointed, because to meet the technical position—

"The Court: How do you feel about the receiver?

"Mr. George [counsel for defendants]: I am not in a position to stipulate to such a thing, your Honor, for this reason. Counsel says it is very technical and it is very technical, and I take the position that the complaint doesn't state a cause of action and I take a position diametrically opposed to counsel, that anything out there has been an accumulation of community property, there is no such testimony, and we take the position that it is not community property and we consequently are opposed to that, that it is not a proper case for a receiver; however, I might say that if what counsel and his client are interested in, is making sure that all the proceeds of any sale that may be made or borrowing of money is not dissipated and that they have something, in the event that they do get a judgment of some kind, that they have some place to reach out and collect it, that is one thing that would not be a pure receivership. I question whether a receiver, unless it is possible to find someone that is—has cannery experience, to go right in and completely operate it.

"The Court: That wouldn't be my idea, it would be a receiver to take charge of all the money that came in and look after the financial structure, but let Mr. Venza manage the cannery because he is the only one that knows how to do it, and on the other hand the wife would be protected, because if she got a judgment in the suit, as she stated, she would have to go—to come in again and it looks to me like a receiver in that sense, that he would take the funds and impound them, pay off the mortgagees that are advancing against these cans of fruit and keep the business rolling would be good sense and not too expensive. If that would meet with more or less the approval of both of you, I would like to see that done and hold the money where we could get at it until the case is tried on its merits and decided.

"Mr. Hawkins: That is the recommendation of the plaintiff, if the Court please.

"The Court: Well—

"Mr. George: I don't want to be compelled to stipulate to that, your Honor, but off the record, if that is the order of the Court, that is the order of the Court. I think that as a practical matter that would work out all right.

"The Court: I make it as an order then, trying to act as a practical businessman and yet trying to protect the plaintiff in the case to the final gun. So if I can see you gentlemen outside, we will proceed to appoint a receiver, if that is agreeable to both of you."

On the following day the court made and entered an order appointing a receiver "of all of the personal and real property of every kind and character of the defendants" upon said receiver giving bond in the sum of $50,000 after the filing of such bond the receiver to "take possession of all of the assets, files, papers, records, documents, monies, securities, choses in action, books of account and all other property, real and personal or mixed, of the said defendants, now in the State of California, and under the jurisdiction of this Court and all property in the custody and the control of said defendants, pending the final determination of this action, or until further order of this Court." The defendants were then enjoined from interfering with the possession of the receiver.

Three days later, in the presence of attorneys for all parties, hearing on the order to show cause and temporary restraining order was dropped from the calendar; and two days later, in the presence of counsel for all parties, it was ordered that upon the qualification of the receiver the restraining order entered October 2nd should be dissolved on plaintiff's giving bond in the sum of $5,000 to provide that plaintiff would pay to defendants all damages sustained by reason of the appointment of the receiver in the event that it should appear that he had been appointed wrongfully, maliciously or without sufficient cause.

On the same day defendants filed their notice of appeal from the order of October 8th appointing the receiver.

[1] Before this court defendants now argue that it was error for the trial court to appoint a receiver to take possession of all of the assets of defendants without notice, and without any previous request by either party, and in the absence of any showing of emergency or necessity for such receiver. They concede that a receiver may be appointed ex parte without notice upon application therefor and a showing "that without such appointment, irreparable injury will unquestionably result before the matter can be heard on notice."

Respondent replies that the appointment of the receiver was made with the consent of plaintiff and defendants; that appellants did not ask for a continuance nor claim that they were taken by surprise; and that, though their counsel did not stipulate he did state that he thought, as a practical matter, it would work out all right; that they do not urge that any miscarriage of justice has resulted.

[2] We are in accord with the argument of respondent. Though the order appointing the receiver is broader than the kind of order suggested in open court, nevertheless no objection thereto was made in the trial court, and counsel for appellants was present in court two days later when the temporary restraining order was dissolved. Also the record shows that at the conclusion of the hearing when the court suggested the appointment of a receiver, it stated: "So if I can see you gentlemen outside, we will proceed to appoint a receiver, if that is agreeable to

both of you." It may be assumed, from the fact that a receiver was appointed and the temporary restraining order was dissolved, that counsel for all parties were agreeable thereto, and that the court acted with their consent. There is no showing that defendants ever opposed in the trial court the appointment of the receiver or the scope of the order of appointment. Those objections are, apparently, made for the first time before this court, and after defendants have been granted a dissolution of the temporary restraining order. There is no showing here that defendants have suffered from the action of the trial court or that any miscarriage of justice has resulted therefrom. There is nothing to show that the receiver interfered with the orderly operation of the cannery or extended his powers further than to "take the funds and impound them, pay off the mortgagees * * * and keep the business rolling," as was the original suggestion of the court, which counsel for defendants thought as a practical matter would work out all right.

It is apparent that the trial judge was endeavoring to protect the interests of all parties, and any objections to his action should, as a matter of courtesy, if no more, have been presented in the trial court. Appellants state in their closing brief that the order "was strenuously opposed in the presence of counsel for respondent, at the time it was signed and entered." Such statement is not sustained by the record which shows no objection on appellants' part; and we think it is sufficient to support an inference that appellants, at least tacitly, agreed. The rule that questions not raised in a lower court will not be considered on appeal is applicable. MacKenzie v. Angle, 82 Cal.App.2d 254, 263, 186 P.2d 30.

[3, 4] It is admitted by counsel for appellants that the appointment of a receiver is discretionary. It has been so determined by the Supreme Court which said, in Goes v. Perry, 18 Cal.2d 373, 381, 115 P.2d 441, 445: "The rule is well established that the appointment of a receiver rests largely in the discretion of the trial court, and that its action in appointing a receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion. [Numerous citations.]" Also see Armbrust v. Armbrust, 75 Cal.App.2d 272, 275–276, 171 P.2d 75. And that such an order may be made without notice and without any previous request by either party has also been decided. In the early case of Whitney v. Buckman, 26 Cal. 447, 448, 453, the court said: "But it is insisted that the Judge erred in appointing a receiver, when the application was for an injunction, and not for a receiver. The bill of exceptions shows, that defendant excepted to the appointment of the receiver, but the ground of the exception is not stated. It is not shown that any objection was made on the ground that the notice did not specify that a receiver would be applied for. The necessary facts and parties were all before the Court. Had the defendant been surprised, and asked for further time to meet the questions as to the propriety of appointing a receiver, doubtless the Court would have given it. But it does not appear that any such desire was manifested, or that any technical objection, or exception whatever was interposed, and we must presume that there was none. The Judge, in the exercise of his discretion, with the necessary facts and parties before him, deeming the case a proper one for a receiver rather than an injunction, made the appointment complained of, and it is manifest that the interest of the parties was subserved by the course pursued."

That case was cited with approval in McGarrah v. Bank of Southwestern Georgia, 117 Ga. 556, 43 S.E. 987, 989, in which it was said: "We can perceive no reason why the chancellor should not, on his own motion, appoint a receiver whenever a proper case is made, even though neither party to the controversy asks for or desires his appointment. Such seems to be the general practice of courts of chancery both in England and America. (Cases cited.]"

Also see Parrish v. Rigell, 1936, 183 Ga. 218, 188 S.E. 15, 107 A.L.R. 1386, in which the McGarrah case is cited.

In High on Receivers (3rd Ed.), sec. 98, p. 86, Whitney v. Buckman is cited; and in his 4th Edition, sec. 83a, p. 110, High says: "Where the title to the subject-matter of the controversy is in dispute and both sides claim the right to possession, and it is conceded by all parties [as it appears here] that the property should be operated pending the determination of the litigation, it is held that the court, of its own motion, may properly appoint a receiver to take and hold possession of the property pending the litigation."

Also see 45 Am.Jur., sec. 89, p. 81, Gray v. Council of Newark, 9 Del.Ch. 171, 79 A. 735, 739, and Crawford v. Crawford, Tex.Civ.App., 163 S.W. 115, 116, holding that a proper court may, on its own motion, without a request therefor by either party, appoint a receiver.

[5] We find no abuse of discretion by the trial court; accordingly the order appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

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95 Cal.App.2d 1

PEOPLE v. HOLT et al.

Cr. 4363.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1949.

Paul Lee Holt and Manuel Govia were convicted of robbery of the first degree and kidnapping for purpose of robbery.

The District Court of Appeal, White, P. J., 209 P.2d 94, affirmed an order of the Superior Court of Los Angeles County, Therman Clark, J., denying defendant's motions to set aside that part of sentence directing life imprisonment without possibility of parole and defendants moved to recall and correct the remittitur.

The District Court of Appeal, White, P. J., denied the motion on the ground that no mistake of fact, inadvertence or incomplete knowledge resulting in prejudicial error or a miscarriage of justice was shown and that record of proceedings at trial established that victim suffered bodily harm so as to sustain order denying motion to set aside sentence.

1. Criminal law 🔑1193

That where transcript of testimony at trial on plea of guilty to charge of kidnapping for purpose of robbery was unavailable when defendants appealed some ten years later from order denying motion to set aside sentence to life imprisonment without possibility of parole, did not constitute such mistake of fact, inadvertence, or incomplete knowledge which would render decision affirming such order, subject to motion to recall and correct the remittitur.

2. Criminal law 🔑1193

A mistake of fact, inadvertence, or incomplete knowledge resulting from prejudicial error or a miscarriage of justice must be shown as ground for retrial and correction of remittitur.

3. Criminal law 🔑1144(13)

Where testimony at trial on plea of guilty to charge of kidnapping for purpose of robbery was unavailable on appeal from order denying motion to set aside sentence to life imprisonment without possibility of parole, reviewing court must presume in support of judgment and in absence of a contrary showing, that evidence was introduced or that defendants admitted that victim suffered bodily harm.

4. Criminal law 🔑998

Record of the proceedings at trial of plea of guilty to charge of kidnapping for purpose of robbery established that victim suffered bodily harm so as to sustain order denying motion to set aside sentence to life imprisonment without possibility of parole.

◆

Paul Lee Holt, in pro per.

Manuel Govia, in pro per.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

Appellants have filed in this court a "Notice of Motion to Recall and Correct the Remittitur" issued in the case of People v. Holt et al., 93 Cal.App.2d 473, 209 P.2d 94.

The motion is based on the claim that "the remittitur was issued through inadvertence, mistake of fact, and an incomplete knowledge of all the circumstances of the case on the part of the court, and has resulted in a miscarriage of justice." No contention is made that fraud was practiced on the court by any one.

Appellants' motion is apparently grounded upon the fact that when the decision was filed in the case of People v. Holt et al., supra, a transcript of the testimony given by witnesses in the trial court as to bodily injury allegedly suffered by the victim of the kidnapping was not before us and that our efforts to obtain one through an order directing the clerk of the Superior Court to furnish the same proved futile because of the length of time (more than ten years) that had elapsed since the judgments and sentences were rendered. Appellants have now provided us with a transcript of the proceedings had at the time judgments and sentences were pronounced and which transcript was, following the pronouncement of such judgments and sentences, forwarded to and since has been in the possession of the prison authorities.

[1-3] We are persuaded that appellants' motion in the instant case is not the form of remedy available for the correction of the type of error of which they complain. To afford a proper ground for recall and correction of the remittitur, a mistake of fact, inadvertence, or incomplete knowledge on the part of the appellate court resulting in prejudicial error or a miscarriage of justice must be shown. In re Rothrock, 14 Cal.2d 34, 38, 39, 92 P.2d 634. In the instant case, this court merely followed the rule that in support of the judgment and in the absence of a contrary showing, it was required to presume that evidence was introduced or appellants admitted that the victim of the kidnapping suffered bodily harm. People v. Holt et al., supra, 93 Cal.App.2d 473, 209 P.2d 94. Manifestly, the record reflected no mistake of fact, inadvertence, or incomplete knowledge which would support a motion to recall and correct a remittitur.

[4] However, in the case now under consideration, the transcript furnished us by appellants is not helpful to their contention that any prejudicial error or miscarriage of justice occurred by reason of the finding of the trial court that the victim of the kidnapping suffered bodily harm. On the contrary, the transcript supports such a finding. The record of the proceedings had in the trial court as produced by appellants shows that the victim was forced out of his cab, made to take off his jacket, had his hands and arms tied, and his boots and trousers removed, his wrists were tied behind him, and then his elbows were tied together behind and his feet tied at the ankles. Then he was tied to a tree with his ankles raised approximately six or eight inches off the ground. The appellants put a handkerchief into his mouth, placed a scarf around his face and tied it tight. In addition, one of the appellants struck the victim in the mouth and on the cheekbone with his fist. The victim was struck sufficiently hard on the mouth that his lips bled and his blood appeared on the handkerchief stuffed into his mouth, which handkerchief was later introduced into evidence. In addition, one of the appellants again struck the victim before they drove away. Also, the appellants projected a shotgun against the ribs of the victim. It would challenge credulity and do violence to reason to assume that the victim of such acts did not suffer bodily harm.

Convinced as we are that the decision of this court in People v. Holt et al., supra, was not improvidently made, upon a false suggestion, or under a mistake as to the facts of the case, and being further convinced that such decision did not result in prejudicial error or a miscarriage of justice, it follows that appellants' motion to recall the remittitur issued therein must be denied. It is so ordered.

DORAN and DRAPEAU, JJ., concur.

94 Cal.App.2d 871

STEITZ v. IRWIN et al.

Civ. 7635.

District Court of Appeal, Third District, California.

Dec. 1, 1949.

Hearing Denied Jan. 30, 1950.

Action by Henry Steitz against Frank B. Irwin and Ollie Irwin, his wife, and J. D. Elliot to cancel a deed wherein the defendants filed a cross-complaint against Henry Steitz and Mae Steitz to cancel subsequent deeds to the same property and to quiet title in cross-complainants.

The Superior Court, El Dorado County, George H. Thompson, J., rendered judgment for defendants, and cross-complainants, and Henry Steitz and Mae Steitz appealed.

The District Court of Appeals, Thompson, J., held that the findings of the trial court in favor of the defendants and cross-complainants were sustained by the evidence, and affirmed the judgment.

1. Deeds 🔑64, 194(1, 4)

Acceptance of a deed by grantee or his representative is necessary to render it valid, but constructive delivery and acceptance of a deed may be presumed when it conveys property beneficial to the grantee and it is delivered to a third party with directions to deliver it to the grantee upon the death of the grantor. Civ.Code, § 1059.

2. Deeds 🔑61

The grantor's irrevocable delivery of a deed to a third person with instructions that it be given to the grantee upon the grantor's death vests the title to the property immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary thereby becomes the trustee of the deed for the grantee. Civ.Code, § 1059.

3. Deeds 🔑141, 208(6)

Where grantor told grantees that he had executed deed giving them the property subject to life estate in favor of grantor, but that grantor would like to have the grantees pay him $35 per month as rent for the property, which they did, the payment of such rent was evidence of the acceptance of the deed by the grantees and was not inconsistent with the reservation of the life estate by grantor.

4. Deeds 🔑194(4)

All legal presumptions support the theory of a constructive acceptance of deed by grantee. Civ.Code, § 1059.

5. Deeds 🔑206, 208(5), 211(1, 3, 4)

In action to set aside deed, findings that grantor had sufficient mental capacity, that there was no confidential relationship between the grantor and grantee, that there was freedom from undue influence, that the execution of the irrevocable gift deed was voluntary, that delivery of the deed to a depositary was made with directions to deliver the deed to grantees upon the death of the grantor and that the deed was executed and delivered with intention on the part of the grantor to convey title to real property to the grantees were sustained by the evidence.

6. Deeds 🔑206

Findings and judgment that subsequent deed of the grantor and his wife to a third person and her reconveyance of the property to grantor and his wife as joint tenants, were void and conveyed no interest in the property in view of prior conveyance to others subject to life estate, were sustained by the evidence.

Arthur DeBeau Carr, Sacramento, for appellants.

Maul, Hughes & Maul, Placerville, for respondents.

THOMPSON, Justice.

This is a suit to cancel a gift deed to real property at Placerville, El Dorado County, on the grounds of lack of execution, mental incapacity and undue influence. From a judgment decreeing title to the real property in question to be in the defendants and cross-complainants, Frank B. Irwin and Ollie Irwin, husband and wife, subject to a life estate in the grantor, and a decree cancelling subsequent deeds which were executed by the grantor and his wife to one Janis H. Benson and a reconveyance to them, the plaintiffs have appealed.

The plaintiff, Henry Steitz, at the time of filing the complaint in January, 1948, was eighty-four years of age. Prior to March 13, 1944, he owned Lot 30 in Block 40, of the City of Placerville, together with improvements, including a building which was used as a barber shop, valued at $10,000. Said plaintiff acquired that property by deed of gift from Maggie Akins one year previous to the last-mentioned date, which deed was executed by her and left in escrow with J. D. Elliot, an attorney at law residing in Placerville, to be delivered to Mr. Steitz upon the death of the grantor, which was done. Mr. Elliott represented Henry Steitz in the probating of the estate of Mrs. Akins. He had previously attended to said plaintiff's legal affairs. They had been acquainted for several years. On March 13, 1944, Henry Steitz went to the office of his attorney, J. D. Elliot, and told him that Frank B. Irwin and his wife had been very kind to him, and had done many good things for him, which the lawyer knew to be true, and that he wanted to give said real property to them. He thereupon directed the attorney to draw a deed to the property to Mr. and Mrs. Irwin as joint tenants. The attorney did so, and the deed was then signed and executed before Mr. Elliot as Notary Public. No other persons were present at that time. The grantor was described in the deed as an unmarried man. Mr. Steitz then handed the deed to Elliot and told him to keep it until his death, and to then deliver it to the grantees. Mr. Elliot, in compliance with those directions, placed the deed in his own safe, where it remained to the time of the trial of this case. Regarding the intention of the grantor to then convey title to the property to the grantees, the following colloquy occurred between Mr. Elliot and the judge of the court at the time of the trial:

"The Court: * * * So, you drew the deed in order that the title might pass to the Irwins? A. Yes.

"The Court: He wanted to give it to them? A. Yes.

"The Court: And Steitz gave you that deed? A. Yes.

"The Court: To be a deed that was to be presently effective as of that time? Is that it? A. Yes."

No other reasonable construction of the testimony as a whole may be drawn from the record except the conclusion from the voluntary execution of the deed and the instructions given by the grantor to his attorney, then that he thereby intended to then convey title to the grantees subject to the retaining of a life estate therein. Mr. Elliot testified that the grantor was of sound mind and that he fully understood the nature of the transaction. Other witnesses testified to the grantor's mental capacity. In fact that was the identical means by which he secured title to the same property from Mrs. Akins one year previously through the same escrow holder of his deed. We must assume the grantor knew the effect of his escrow instructions.

It satisfactorily appears that neither Mr. nor Mrs. Irwin was present at the time of the execution of the deed. There is no substantial evidence of undue influence or inducement to procure the execution of the deed. The grantees did not know of the execution of the deed until sometime subsequent thereto, when Mr. Elliot first informed them of it. Several witnesses testified that Mr. Steitz told them he had given or conveyed the property to Mr. and Mrs. Irwin. Mr. Steitz himself later told the Irwins that he had deeded the property to them.

Sometime prior to June 23, 1947, Mr. Steitz married his present wife. On the last mentioned date, Henry Steitz and his wife without the knowledge of the Irwins joined in a purported deed of conveyance of the same property to Janis H. Benson which was recorded the same day. Janis H. Benson then purported to reconvey the property to Henry Steitz and his wife as joint tenants, which deed was also immediately recorded.

Learning of the last mentioned deeds, the Irwins served personal notice of their claim of title to the property by virtue of the deed dated March 13, 1944. This suit was then commenced by Henry Steitz to cancel the deed of March 13, 1944, as previously stated. The defendants answered, denying the material allegations of the complaint, and filed a cross-complaint to cancel the subsequent deeds of June 23, 1947, to Janis H. Benson and the reconveyance of the property to Henry Steitz and his wife and to quiet title to the property in the Irwins, subject to the life estate in Mr. Steitz.

The court adopted findings favorable to the defendants and cross-complainants Mr. and Mrs. Irwin in every material respect. Judgment was rendered accordingly, cancelling the last-mentioned deeds, refusing to grant the relief demanded by plaintiff, and quieting title in the Irwins, subject to the life estate of Henry Steitz. From that judgment this appeal was perfected.

The court determined that plaintiff was formerly the owner of the property in question, and that, on March 13, 1944, he voluntarily executed to defendants Mr. and Mrs. Irwin a gift deed thereto, with the intention to then convey title to them. subject only to a life estate in the grantor; that he instructed his attorney to keep the deed in his possession until the death of the grantor and to then deliver it to the grantees, which instructions he has fulfilled to date; that it was the intention of the grantor, at the time of executing the deed, to presently pass title to the grantees subject to the life estate; that at the time of executing the said deed plaintiff was of sound mind and free from undue influence; that plaintiff was at that time of commencement of this action eighty-four years of age and in good physical and mental condition with the exception that he was suffering from arthritis; that a confidential relationship with the grantees did not exist, and that the grantor had full knowledge of said transaction and the effect of the execution and delivery of the deed, dated March 13, 1944. The court held that the defendants Mr. and Mrs. Irwin held title to said property, under said deed, subject only to the life estate reserved to the grantor. It was also held that the subsequent deed to Janis H. Benson and the reconveyance of the property to plaintiff and his wife were void and conveyed no title.

[1] The appellants argue that acceptance of a deed by the grantees is necessary to make it a valid conveyance, and that the depositary of the deed involved in this case, J. D. Elliot, who was the attorney and agent of the grantor, could not also become the agent of the grantees for the purpose of acceptance. It is true that acceptance of a deed by the grantee or his representative is necessary to render it valid. 9 Cal. Jur. 150, sec. 49. But constructive delivery and acceptance of a deed may be presumed, when it conveys property beneficial to the grantee and it is delivered to a third party with directions to deliver it to the grantee upon the death of the grantor. Section 1059 of the Civil Code provides in part:

> "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:
>
> "1. * * *
>
> "2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, *or may be presumed.*" (Italics added.)

[2] The rule of law, with relation to the effect of constructive delivery and acceptance of a deed, under Section 1059 of the Civil Code, is concisely stated in the recent case of Wilkerson v. Seib, 20 Cal.2d 556, 127 P.2d 904. That case appears to be conclusive of that issue in the present case. The Supreme Court said, 20 Cal.2d at page 559, 127 P.2d 904, 906: "* * * in accord with the rule established by a long line of decisions in this state headed by the pioneer case of Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186, that the grantor's irrevocable delivery of a deed to a third person, with instructions that it be given to the grantee upon the grantor's death, has the effect of vesting the title to the property immediately in the grantee, qualified only by a life tenancy in the grantor, *and the depositary thereby becomes the trustee of the deed for the grantee.* [Citing numerous authorities.]" (Italics added.)

In Drummond v. Drummond, 39 Cal.App. 2d 418, 103 P.2d 217, 220, this court said:

"Manual delivery of a deed to the grantee is not essential to the passing of title. No particular form of delivery is required.

Delivery and acceptance of a deed may be manifested by the declarations, acts and conduct of the parties. [Citing authorities.] * * *

"When the execution and delivery of a deed with the intention of thereby conveying title to the grantee is satisfactorily established, neither the subsequent collection of rental therefrom, the mortgaging of the property without the knowledge or consent of the grantee, nor the attempt to convey it to another person, will vitiate the title of the grantee."

In the case of Herman v. Mortensen, 72 Cal.App.2d 413, 164 P.2d 551, 553, which was quite similar to the present case upon its facts, and which involved the question of the acceptance of a gift deed, the court said:

"The second question presented is whether there is evidence of any substantiality to support the implied finding that the grantee accepted or assented to the deed.

"The court instructed the jury that 'The law presumes that the grantee has accepted the grant or gift even though he has no knowledge of it or there is no express consent to such gift, where such gift would be beneficial to such grantee.' The jury was also told that before finding in favor of the plaintiff it must believe 'that the transfer was beneficial to Mrs. Glenn'. The verdict in plaintiff's favor carries with it an implied finding that it *was* beneficial.

"The deed itself is evidence that the transfer was beneficial to the grantee. It is a *deed of gift;* it is free, on its face, of all burdens and obligations and there is no extrinsic evidence of any burden or obligation. * * *

"* * * *'In the case of an adult donee, if the donation is for his advantage he will be presumed to have accepted it unless the contrary appears.'* "

[3, 4] In the present case the gift deed was absolute on its face, subject only to the reservation of a life estate in the grantor. It contained no conditions or burdens. It is true that Mr. Steitz orally told Mr. Irwin that he had executed the deed giving them the property, but that he would like to have them pay him $35 per month as rental for the barber shop, which they did. That was not inconsistent with the reservation of the life estate. The payment of that rent is evidence of the acceptance of the deed by the grantees. All legal presumptions support the theory of a constructive acceptance of the deed. It is evident that if more definite findings had been made regarding the subject of acceptance, they would have been adverse to the plaintiff.

[5, 6] It is not necessary to recite the evidence which supports the findings and judgment in this case. It is a voluminous record. There is a conflict of evidence on several issues. It is sufficient to say we have read the record and find an abundance of evidence to support each essential finding, including mental capacity of the grantor, absence of confidential relationship, freedom from undue influence, and the voluntary execution of the irrevocable gift deed to the grantees subject to the reservation of a life estate, and delivery of the deed to a depositary with absolute directions for him to deliver the instrument to the grantees upon the death of the grantor. There is ample evidence to show that the deed was executed and delivered with the intention on the part of the grantor to then convey title to the real property to the grantees. There is also sufficient evidence to support the findings and judgment that the subsequent deed of the plaintiff and his present wife to Janis H. Benson, dated June 23, 1947, and her reconveyance of the property to plaintiff and his wife as joint tenants were void and conveyed no interest in the property. It follows that the court properly set the last-mentioned deeds aside, and quieted title to the property in the defendants and cross-complainants Mr. and Mrs. Irwin.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

94 Cal.App.2d 941

ADAMS v. ALLEN et al.

Civ. 14024.

District Court of Appeal, First District,
Division 2, California.
Dec. 6, 1949.

J. B. Adams, as assignee of the Emporium, a department store, brought action against Charles L. Allen and Ellis Allen, also known as Ellis Henderson, to recover for amount of alleged charge account of Ellis Allen at the Emporium.

The Superior Court in and for the City and County of San Francisco, Edward Molkenbuhr, J., rendered a judgment for plaintiff for $10.76, and the plaintiff appealed.

The District Court of Appeal, Goodell, J., affirmed the judgment, holding that evidence sustained finding that signatures on charge account of Ellis Allen were not genuine, but were forged.

1. Appeal and error ⇐1012(1)

To warrant an appellate court in determining that there is no substantial evidence because of inherent improbability there must exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story.

2. Appeal and error ⇐1012(1)

The District Court of Appeal cannot reverse on the ground that finding of negligence is contrary to the evidence, unless it can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint.

3. Sales ⇐52(1)

In action by assignee of department store to recover for merchandise allegedly sold to defendant on charge account, burden was on assignee to prove that signatures on charge account in name of defendant were genuine and not forged.

4. Sales ⇐52(5)

In action by assignee of department store to recover for merchandise allegedly sold to defendant on charge account, evidence sustained finding that signatures on charge account in name of defendant were forged.

5. Husband and wife ⇐229(3)

Where there was no allegation in complaint in action against alleged husband and wife for amount allegedly owing by alleged wife for merchandise purchased, that they were husband and wife, there was no basis for holding alleged husband for amount of indebtedness allegedly incurred by alleged wife. Civ.Code, § 170.

◆

Frank C. S. Pederson, San Francisco, Robert L. Ward, Oakland, for appellants.

Joseph G. Gallagher, San Francisco, for respondent.

GOODELL, Justice.

Plaintiff, as assignee of The Emporium, a San Francisco department store, sued for $2705.95 as owing for merchandise. Defendant Ellis Henderson admitted owing $10.76 but denied owing any more, and judgment was entered for $10.76 against her. While the plaintiff appealed from the whole of the judgment we assume the appeal was addressed only to that part of the judgment which denied a recovery for the difference between $10.76 and $2705.95.

The court found that defendant Ellis Henderson did not incur any indebtedness after 1945; that the charges in question were incurred in December, 1947, but were not made or authorized by her "nor did she sign the sales slips thereof; that the simulation of her signature upon the sales slips was a forgery."

The only question is whether these findings are sustained by the evidence.

On May 12, 1943 defendant Ellis Henderson opened a charge account at The Emporium, which issued to her a "Charga-plate" containing her signature. Under the store's routine a sale, if under $25, would be made on credit if the signature on the sales slip corresponded with that on the plate held by the customer.

Ellis Henderson admitted making purchases with her "Charga-plate", but testified that she paid her bills monthly up to May, 1945, excepting the $10.76 balance.

She testified she had evidently lost the plate as she had not seen it since August, 1947, and never thereafter attempted to buy on credit at The Emporium. There is no claim that between May, 1945, and December, 1947, any charge was made against the account. From December 1st to 27th, however, there were 173 sales charged against the account (each under $25) aggregating $2695.19, all negotiated with Ellis Henderson's "Charga-plate." This averages 7½ sales a day in 23 shopping days. On one day there were 17 sales, each made in a different department.

Several of Ellis Henderson's signatures, including those she wrote in the courtroom, were used as exemplars. A handwriting expert testified that in his opinion all the signatures on the 173 December sales slips were written by the person who wrote the exemplars. Defendant Ellis Henderson denied that she wrote any of them.

Appellant contends that the respondent's testimony is inherently improbable and that the court's finding of forgery is without evidentiary support, relying on such cases as De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059.

[1, 2] The rule is stated in Powell v. Powell, 40 Cal.App. 155, 158, 180 P. 346, 348, as follows: "To warrant it (an appellate court) in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story." In the leading case of Austin v. Newton, 46 Cal. App. 493, 498, 189 P. 471, 473, the court said: "We cannot reverse upon the ground that the finding of negligence is contrary to the evidence unless we can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint."

[3] There is nothing unusual about the loss of the plate—a light metal device about once and a half the size of an Annapolis postage stamp—and defendant's testimony that the 173 signatures were not hers did not involve any inherent improbability. Her testimony simply raised an acute conflict on an issue of fact. It was within the realm of possibility that the signatures were forged. However, the burden was not on the defendant to so prove, but on the plaintiff to prove them genuine The gist of the expert's testimony was that it would be "mathematically impossible" for a person to successfully imitate a signature as many as 173 times under shopping conditions This was a matter of opinion and however extraordinary the feat of wholesale simulation, it was not a physical impossibility

[4] The last attempt to use the plate was on December 27, 1947 at about 5:30 p. m., when a woman selected a $17.41 lamp. The saleswoman phoned the credit department (because the lamp was breakable) whereupon the woman gave an excuse and departed. Shortly after this incident defendant Ellis Henderson called at plaintiff's office at his request. The saleswoman was brought in to identify her as the woman who had shopped for the lamp but apparently without hesitation she said defendant was not the woman. At the trial the saleswoman testified that "To me she looks the same, though I wouldn't swear to it." This hesitant and equivocal testimony, when taken in connection with her definite failure to make the identification shortly after the incident, raised a question which might well have been decisive.

Moreover the defendant testified that on December 27 she was at work from 4 p. m. until 12 p.m., and in this she was corroborated. She also testified definitely that she did not visit The Emporium on that day. She admitted making several purchases at The Emporium during December, 1947, but said she paid cash, assuming that she no longer had credit.

[5] Defendant Charles L. Allen was joined on the theory that he was the husband of defendant Ellis; that the $10.76 admittedly owing by her was for necessaries, and that the judgment (if only for $10.76) should have run against him as

well. There is in evidence a letter written by defendant Ellis to The Emporium in March, 1946 in which she states that she had married Charles L. Allen. There is evidence as well that defendants described themselves in another document as husband and wife. Both, however, testified that they were not married, and the court so found. The $10.76 indebtedness had been contracted by defendant Ellis Henderson before May, 1945; there was no proof as to the date of the claimed marriage. Indeed there is no allegation in the complaint that the defendants were husband and wife. Hence there was no basis whatever for holding defendant Charles L. Allen on the $10.76 debt. See White v. Gobey, 130 Cal.App.Supp. 789, 19 P.2d 876; also sec. 170, Civ.Code.

There is ample evidence to support the findings.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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94 Cal.App.2d 826

JEANES v. HOLTZ et al.

Civ. 3878.

District Court of Appeal, Fourth District, California.

Nov. 28, 1949.

J. D. Jeanes sued Henry A. Holtz and others to recover damages for the alleged poisoning of his bees as the result of crop dusting by an airplane.

The Superior Court for Orange County, Franklin G. West, J., rendered a judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Griffin, J., affirmed the judgment, and held that the complaint did not state a cause of action.

1. Animals 🔑43

The statute which penalizes persons who willfully administer poison to an "animal" with intent that it shall be swallowed, but which provides that predatory animals may be poisoned upon posting notice has no application to unintentional poisoning of bees on one's own premises. Fish and Game Code, § 1230; Pen.Code, § 596.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Animal".

2. Negligence 🔑56(1.8, 1.12)

To be the "proximate cause" and entail legal responsibility, a cause must be one but for which the result would not have happened, and must be active enough for the result to be regarded in law as efficient in responsibility.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Proximate Cause".

3. Animals 🔑44

Complaint against owners of crops and operators of airplanes, which alleged that operators negligently dusted crops with chemical poisonous to bees without giving notice that poison would be exposed on the premises, and which alleged that plaintiff's bees while gathering pollen on crop owners' property and that of others were poisoned, but which failed to allege that failure to give notice was proximate cause or that apiaries were contiguous to defendants' lands or that poison floated into the hives, did not state a cause of action for damages. Agricultural Code, § 150; Fish and Game § 1230; Pen.Code, § 596.

Meyer & Dreizen, N. D. Meyer, Samuel Dreizen, Santa Ana, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiff's second amended complaint alleges that defendants Jack Patton and Bob Johnson were partners engaged in the business of crop dusting by airplane; that as agents and servants they dusted the crops belonging to the defendants Holtz, and while doing so they acted negligently and carelessly; that plaintiff owned 126 stands of bees located on the Fairview Farms, about three-fourths of a mile distant from defendants' property and owned 130 stands of bees located about three-fourths of a mile in another direction, from the defendant Holtz's property. The allegation is that a certain chemical powder known as "Cryolite 70" was used and was poisonous to bees; that it was used for the purpose of killing pests, insects, etc. on peppers grown on the Holtz property; that while thus engaged, Patton and Johnson negligently and carelessly deposited said Cryolite 70 upon said pepper fields and caused and permitted said Cryolite dust powder to float in the air about the field and upon and about surrounding properties and adjacent alfalfa fields and other growth in bloom so as to pollute the air and cause death and destruction to plaintiff's bees; that defendants failed to give proper notice under sec. 596 of the Penal Code that poison would be exposed on the premises, and to give further notice as required by sec. 1(C) of the Rules and Regulations of the Director of Agriculture, issued July 10, 1944, pursuant to sec. 150 of the Agricultural Code of this state. It is then alleged that plaintiff's bees, while gathering pollen and traveling back and forth from the fields to the hives, became contaminated with the Cryolite and poisoned the bees in the hives; that defendants should have known that plaintiff's bees were feeding on the fields of defendants and that Cryolite 70 was poisonous to them; that defendants "acted maliciously and were guilty of willful, negligent * * * careless and wrongful failure to give" to plaintiff the notice required.

Plaintiff claims he suffered damage in the sum of $3,686 compensatory damages and $3000 exemplary damages. A demurrer was sustained to the second amended complaint without leave to further amend. Judgment in favor of defendants was entered and this appeal followed.

Section 596 of the Penal Code provides that "Every person who * * * wilfully administers poison to any animal, the property of another, or exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, is guilty of a misdemeanor." Then follows "Rules governing poisoning of predatory animals", and provides that "this section shall not apply in the case of a person who exposes poisonous substances upon premises or property owned or controlled by him for the purpose of controlling or destroying predatory animals or livestock-killing dogs and if, prior to or during the placing out of such poisonous substances, he shall have posted upon the property conspicuous signs located at intervals of distance not greater than one-third of a mile apart," indicating that poisonous bait is placed out on the premises. It further provides that "Whenever such signs have been conspicuously located upon the property * * * such person shall not be charged with any civil liability to another party in the event that any domestic animal belonging to such party becomes injured or killed by trespassing or partaking of the poisonous substance or substances so placed."

[1] It is clear that this section has no application to the unintentional poisoning of bees on one's own premises. Bees are not classified as predatory animals under sec. 1230 of the Fish and Game Code. Notices are not required to be posted under circumstances such as here related and there is no allegation that defendants dusted their fields with the intent that plaintiff's bees should become poisoned as a result thereof.

Section 1(C) of the Rules and Regulations of the Director of Agriculture, supra, is directed only "to persons engaging in the business of eradicating * * * pests for hire" and who, when using materials known to be lethal to bees, must "exercise every precaution to protect all property from damage." It then provides that such persons "shall confine the material applied substantially to the premises of intended application so as not to cause loss of bees * * * on adjacent premises"; that when using such materials such persons "shall notify the Agricultural Commissioner" of such intent, 48 hours in advance, who shall keep a record of and "make said information available to interested persons applying at his office." There is no allegation that Patton and Johnson were not licensed operators under the act.

It is plaintiff's argument that a violation of this regulation by failing to notify the Agricultural Commissioner of such intent was negligence per se, citing 19 Cal. Jur. 640, sec. 71; and Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A. 1917C, 477, Ann.Cas.1918E, 560.

[2] The allegation is that defendants Patton and Johnson were the only defendants who were engaged in the business indicated. Whether plaintiff applied to the office of the Agricultural Commissioner as an "interested person" and failed to obtain the information required to be given is not alleged. There is no allegation that the failure to give the notice above indicated by the person engaged in such business was a violation of such regulation and was a proximate cause of the damage claimed, i. e., an allegation that the act or omission contributed directly to the injury, for if it did not, it matters not how improper or illegal the act may have been in the abstract. 19 Cal.Jur. 636, sec. 67; 19 Cal. Jur. 640, sec. 71.

In Sedgwick on Damages, Ninth Edition, Vol. 1 p. 200, the rule is stated thus: "* * * First, to be proximate and entail legal responsibility, a cause must be one but for which the result would not have happened. Second, not only must this test be satisfied, but also this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility". See, also, Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 87 P.2d 917. It should be further here noted that the regulation itself only requires that the material be applied substantially to the premises of intended application.

The case of Miles v. A. Arena & Co., 23 Cal.App.2d 680, 73 P.2d 1260, 1261, relied upon by plaintiff, is factually distinguishable. There the plaintiff had his bees on rented property about one-half mile from the property being dusted. The trial court found that the poisonous dust floated from the melon field of defendant to the apiary and into the hives and killed all the bees, and not that the damage was caused by the bees going in search of honey to blossoms on the field being dusted. It is not alleged in the complaint that the properties on which plaintiff's apiaries are located are contiguous or adjacent to the premises owned or operated by the defendant Holtz. In fact the legal description alleged indicates that there is other intervening property between that of defendants and the property described by plaintiff as the place where his apiaries were located, and the allegations are that on the intervening adjacent property were alfalfa fields (apparently owned by others) on the blossoms of which plaintiff's bees fed and gathered honey and pollen. It is not alleged that any injury was done to any hive or hives of bees by dust floating "to the apiary, into the hives" as in Miles v. A. Arena & Co., supra. Unfortunately, the bees were oblivious to the respective property lines. Their usual custom of examining each blossom to see if it would give forth the usual honey content would probably have been unaffected by the failure of defendants to give a notice to the office of the Agricultural Commissioner that the lethal poisons were about to intercept their daily custom and habits and destroy them, together with other animal life such as insects and parasites located on or adjacent to defendants' property.

[3] In Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454, as modified on rehearing, the Supreme Court of Arizona held the defendant, who was dusting his crop and permitted the dust to settle around or upon plaintiff's apiary across the road, was liable for the damage resulting, but indicated, by way of dicta, as in the Miles case, that no liability would exist if the bees died as a result of contact with the poison when they were operating beyond the confines of their owner's property. In the Lundberg case the court instructed the jury that if the bees were trespassers the plaintiff could not recover. In plaintiff's complaint nowhere is it alleged that the dust settled upon the hives or upon the property of the plaintiff, but only that the bees came in contact with the dust while on defendants'

property and property of others than plaintiff immediately adjacent thereto. This is not a sufficient basis upon which to predicate liability on the part of the defendants.

Judgment affirmed.

BARNARD, P. J. and MUSSELL, J. concur.

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94 Cal.App.2d 766

MORENO MUT. IRR. CO. v. BEAUMONT IRR. DIST. et al.

Civ. 3835.

District Court of Appeal, Fourth District, California.

Nov. 23, 1949.

Rehearing Denied Dec. 19, 1949.

Hearing Denied Jan. 19, 1950.

The Moreno Mutual Irrigation Company sued the Beaumont Irrigation District, a public corporation, and others, to quiet title to alleged water rights and to set aside a prior judgment.

The Superior Court for San Bernardino County, Martin J. Coughlin, J., granted a temporary injunction, and defendants appealed from the order.

The District Court of Appeal, Griffin, J., reversed the order, and held that the prior judgment was binding on the parties and was not voidable on ground of mistake, or contrary to public policy.

1. Injunction 🔑144

A preliminary injunction is warranted only if there is on file a complaint which states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction; and complaint must allege facts showing injunction was reasonably necessary to protect legal rights of plaintiff pending litigation.

2. Judgment 🔑485, 501, 511

Collateral attack will not lie against judgment unless it is void on its face, that is void as appears from an inspection of the judgment roll, except in cases of extrinsic fraud or mistake.

3. Waters and water courses 🔑101

Landowner who is an exporter of water with no overlying or riparian rights to waters extracted from wells on the land has no right to water for export unless a surplus exists in subterranean basin.

4. Appeal and error 🔑931(3)

Where findings are waived, it is presumed that every fact essential to support of judgment was proved and found by the court.

5. Judgment 🔑470

Every presumption is in favor of validity of a judgment; and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it; and where record is silent as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but was rightly done.

6. Judgment 🔑495(1)

Even though existence of a jurisdictional fact be not affirmed in the record, it will be presumed.

7. Judgment 🔑713(2)

Where issues are made in a case and decided whether with or without trial, judgment is conclusive between the same parties in any subsequent action for the same cause as to all questions which were directly involved within the issues made and which were or might have been presented and decided.

8. Waters and water courses 🔑107(3)

Judgment by stipulation between users of underground water in area described as Beaumont-Yucaipa Basin, which limited amounts to be taken, which did not show that other than full beneficial use was permitted, and which showed that court was convinced that excessive pumping for export purposes directly affected supply of others, although boundaries of underground basin were not determined, did not violate public policy requiring beneficial use of water resources. Const. art. 14, § 3.

9. Contracts ⚷93(1)

"Mistake" of which a party to written contract may complain in equity must be a mistake of law or a mistake entertained by plaintiff with knowledge arising under circumstances which impose duty on defendant to correct plaintiff's error, or must cause failure of contract to express real intention of the parties, although mistake does not render contract voidable if it affects some collateral though material matter constituting a matter of inducement. Civ.Code, § 1640.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistake".

10. Contracts ⚷93(5)

If parties contract under belief that subject matter or consideration is in existence and, in effect, condition their contract thereon, and, as a matter of fact, subject matter is not in existence, such mistake will enable party to avoid contract, although not where parties are aware that existence of subject matter is doubtful and contract with reference thereto. Civ. Code, § 1640.

11. Contracts ⚷93(1)

Where party enters into contract ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after attention has been called to it, there is no "mistake" in the legal sense which will permit him to avoid the contract. Civ.Code, § 1640.

12. Judgment ⚷501

Where prior users of underground water in Beaumont-Yucaipa area believed that basin existed and that excessive pumping by exporting parties was diminishing water supply, but exporting parties doubted existence of basin, and judgment by stipulation between parties was entered perpetually limiting future amounts which could be pumped, exporting parties could not collaterally attack judgment on ground of mistake after operating under it for over 16 years on theory that true underground conditions permitted unlimited pumping for export without adversely affecting other users.

Thompson & Colegate, Riverside, Surr & Hellyer, San Bernardino, for appellants.

John W. Preston, Los Angeles, King & King, San Bernardino, Best, Best & Gabbert, Riverside, for respondent.

GRIFFIN, Justice.

This is an appeal by the defendants Beaumont Irrigation District, a public corporation, and others from a preliminary injunction restraining them, pending trial, from enforcing portions of a certain stipulated judgment between them and plaintiff Moreno Mutual Irrigation Company, a corporation. The latter corporation brought this action to quiet title to alleged water rights and to set aside the stipulated judgment, and sought temporary injunctive relief.

Counsel have adopted, for convenience sake, brief designations of the several parties, title of actions, property involved, and have referred to them as follows:

"(a) 'Moreno' shall mean Moreno Mutual Irrigation Company, a corporation.

"(b) 'Beaumont-Yucaipa parties' shall mean Beaumont Irrigation District, a public corporation, and six other mutual water companies.

"(c) '1926 action' shall mean that certain action No. 24570 brought by the Beaumont-Yucaipa parties against Moreno in the Superior Court of San Bernardino County entitled 'Yucaipa Water Company No. 1, a corporation, et al., plaintiffs, v. Moreno Mutual Irrigation Company, a corporation, et al.

"(d) '1929 Stipulation' means the stipulation for judgment in the 1926 action.

"(e) '1929 Judgment' means the judgment in the 1926 action, copy of which is annexed to Moreno's Second Amended Complaint in the pending litigation as Exhibit C.

"(f) '752 acres' means the land described in paragraph VII of Moreno's Fourth Amended Complaint in this action.

"(g) 'Beaumont-Yucaipa Basin' means that certain area defined in paragraph XXIII of the 1926 Complaint."

The Moreno Valley lies southwesterly and some miles distant from, the Beaumont-Yucaipa basin, and intervening between Moreno Valley and Beaumont-Yucaipa basin is a range of hills known as the "bad lands". According to the pleadings, in 1920, Moreno conceived the idea of developing water in the Beaumont-Yucaipa basin, and transporting it across the bad lands to Moreno Township. To this end Moreno obtained a deed to 752 acres of land in the Beaumont-Yucaipa basin. In 1921, the Beaumont-Yucaipa parties threatened suit and in that year the parties entered into a written agreement refraining from suing for a period of one year. In 1926 the Beaumont-Yucaipa parties instituted the 1926 action, after Moreno had drilled three wells on the 752 acres.

For a better understanding of the issues presented in the 1926 action the complaint alleged generally that the Beaumont-Yucaipa parties were serving water to lands valued then at more than $4,000,000; alleged the ownership thereof by the Beaumont-Yucaipa parties and of all water rights thereunder, the extent of the ownership of each party, and the number of acres irrigated by each; and that the inhabitants of the district, numbering upwards of 2000 people, received their domestic water supply from the district. The complaint particularly averred the existence of a continuous underground body of percolating water in the Beaumont-Yucaipa basin; "that said basin contains vast deposits of detritus sand, gravel and other alluvial material permeable by and saturated with water, and the geological formation of said basin forms and constitutes a natural subterranean reservoir containing large quantities of sub-surface water throughout its area," and in paragraph XXIII describes it with some particularity. It then alleges "That all of the wells * * * described, * * * including the * * * land * * * on which * * * the defendant, Moreno * * * has sunk wells * * * has been, from time immemorial, and still is, sub-surface water in contact and continuity, extending from each of said tracts, to each of the other tracts, owned respectively by said plaintiffs, * * * in said basin, and each of said wells reaches down into, and penetrates said water, and said sub-surface water constitutes and is the common source of water supply for each of the plaintiffs herein * * *" that "all of the subterranean waters contained in said basin constitute and are an entirely separate and distinct water plane from any water plane in any lands lying outside of said basin, and if any of the waters of said basin are withdrawn therefrom, and used on lands situate on lands beyond said basin, none of such waters, so withdrawn, will return to or reenter said basin;" that "No surface water nor any water in excess of the amount of water reasonably necessary to supply and maintain the rights, needs and uses of said plaintiffs, exists in said basin, and during no time are the waters of said basin more than sufficient for such rights * * *" that "for some years last past, the level of the underground water in and throughout said basin, has been rapidly declining; * * * the existing uses made of said water derived from said basin, already exceed the amount of the normal and natural underground water supply thereof, and no unappropriated water now remains in said basin, and none of the subterranean waters thereof can be withdrawn and exported from said basin, without depriving the plaintiffs of the quantity of water in said basin to which the plaintiffs are respectively entitled. * * * That the defendant, Moreno * * * recently entered upon certain lands * * * situate in said basin * * * and sunk at least four wells * * * installed pumping plants for the purpose of pumping water from said wells. That each of said wells so sunk by said defendant is located in said basin, over and in said permeable material, and each of said wells in this paragraph mentioned reaches down into, and penetrates the subsurface waters contained in said material which said water constitutes a common source of water supply for said plaintiffs as aforesaid; that said defendant now intends to immediately construct a pipeline, of water-carrying capacity, sufficient to conduct therethrough at least 500 inches of water, and extending from said wells of defendant to a tract of land, containing approximately 1200 acres of land lying in the township of Moreno * * * and said tract of land is situate far beyond and outside of any of the confines of said basin. That * * * Moreno * * * threatens that it will * * * pump water from said last-mentioned wells, and by means of said pipeline divert and conduct from said wells, and said basin forever hereafter * * * at least 500 inches of water * * * and export all of said water * * * from said basin and discharge all of said water on said tract of land, in said township of Moreno, which said last-mentioned tract * * * lies outside of the watershed, in which said basin is located. That said defendant, Moreno, * * * will * * * export said quantity of water from said basin * * * and * * * which will * * * inevitably * * * deplete, exhaust and destroy the available supply of water of the plaintiffs. * * * That none of the water so threatened to be exported from said basin by said defendant * * * will, if so exported, ever return to said basin * * * and each of said plaintiffs is the owner of the right to have said waters remain in said basin * * * That all of said claims * * * of said defendants * * * to the right to conduct and export any subsurface or surface waters out of and from said basin, to any place beyond the confines thereof, are without right * * * whether the same be surface or subterranean or normal or flood or storm waters". The complaint asked that each of the plaintiffs be declared to be the owner of the water rights alleged and that title of each of them be quieted and that it be declared that none of the defendants own any right, privilege or easement of conducting or exporting from or out of said basin, any of the waters thereof, to any place beyond the confines of said basin. It is then alleged that the Beaumont-Yucaipa parties, and those served by such parties, depended entirely on the water supply existing in that basin and that there was no surplus of water existing.

Defendant Moreno answered, denied generally and specifically the allegations of the complaint and in particular denied "that there is no surplus water in excess of the amounts of water reasonably necessary to supply or maintain the rights, needs or uses of the plaintiffs in said basin." It denied "that there is no unappropriated water under said basin * * * or under any basin * * * and deny that the wells sunk by these defendants as alleged in paragraph XXVI are sunk into any basin connected with the basin or water supply of the plaintiffs or any of them or touch the main source of water supply of the plaintiffs, and the defendants deny that the tract of land in the district in which the defendant Moreno * * * expects to supply is outside of the basin from which said defendant expects to take and carry water thereto; deny that any of the water underlying the defendant's land * * * is in any manner connected with the water supply or basin from which the plaintiffs * * * draw their water supply." Defendants then alleged "that the lands of the plaintiffs and defendants are in the Santa Ana watershed and that the underground water supplies in said watershed lie in the same general basin and that any water extracted from the lands of the defendant Moreno * * * transported to its district and used thereon for irrigation would naturally return to the said Santa Ana basin." And they deny that the taking of any water would in any wise injure plaintiff's lands.

It appears from an affidavit of one of the engineers then employed to make investigations, which affidavit is filed in the instant proceedings, that there were considerable negotiations between the respective parties looking toward the settlement of the litigation and that they accordingly agreed to a stipulated judgment which was subsequently entered. The stipulation to enter the judgment, signed by all parties in 1929, recites that the "making of any findings of fact and conclusions of law is hereby expressly waived."

By the 1929 judgment it was agreed and ordered that "each of said plaintiffs, as against said defendants, is the owner of the right to take and use water from the lands and water sources alleged in the complaint herein to be owned by such plaintiff, lying within that certain tract of land specifically described in paragraph XXIII of said complaint and referred to in said paragraph as the 'Beaumont-Yucaipa Basin', at least to the extent set forth in said complaint, without any interference on the part of either of said defendants except as hereinafter specifically permitted, and said right of each of said plaintiffs is paramount to any of the rights of either of said defendants." It is then recited that "the court refrains from deciding upon or in any way decreeing hereunder the truth of any allegation contained in said complaint relating to the alleged existence of said Beaumont-Yucaipa Basin, and the entire area of land contained within the alleged boundaries of said Basin set forth in said paragraph XXIII of said complaint as hereinafter generally referred to as 'said area', and no decision is made hereunder as to whether said area does or does not constitute a natural subterranean reservoir, nor is any decision made hereunder respecting the geological formation contained in said area."

The judgment, as entered, respecting the settlement arrived at by the parties, provided in considerable detail that one of the wells on Moreno's property would and should act as the index or barometer well. The judgment recites that after 1930, the barometer well shall be used as a basis for "determining the quantity of water which said defendants or either of them shall be permitted to pump or extract from any well or wells, tunnel or any underground water development now or hereafter existing in said area." An elaborate scale was prepared and included in the judgment and provided that where the water level in the "index well" reached a specified level downward, the amount of water Moreno could take from said wells was reduced accordingly, and when that index reached a certain figure all transportation or diversion of water to Moreno township should cease. However, this did not affect Moreno's right to pump water for the benefit of its 752 acre tract. The parties had access to the readings at the "index well" under the judgment. A wire was installed by Moreno for the purpose of measuring water diverted from the wells of defendant and the recording sheets of the nilometer subsequently installed were made accessible to all parties at all times. It is further provided therein that none of the several maximum quantities of water which either of said defendants is permitted thereunder to pump from said area shall be increased or affected by the future acquiring of any additional lands or water rights in said area, and that "No objection shall ever be made by any party to this judgment as to the interest or right of any such party * * * as to the validity of this judgment in so defining such interest * * * None of said plaintiffs shall ever hereafter sink any well or construct any underground water development within a radius of one mile from said Index Well. * * * Each of the parties to this judgment waives all right of appeal therefrom, and no appeal shall be taken by any party hereto from this judgment or any part hereof, * * *. That neither of said defendants has or owns any right to pump water in said area (to wit, the territory lying within the boundaries of the alleged 'Beaumont-Yucaipa Basin' as specified in paragraph XXIII of the complaint on file in this action) or any part thereof, or to directly or indirectly receive or divert any water at any time pumped in or from said area, or any part thereof, except as herein decreed * * *."

It should be here noted that the 752 acres belonging to Moreno and the wells drilled thereon were alleged to be within the area described in paragraph XXIII of the complaint.

The judgment further provided that "each of said defendants * * * are hereby perpetually restrained and enjoined from directly or indirectly pumping any water in any part of said area or receiving or diverting any water at any time pumped in or from said area except as herein decreed, and from asserting any right to pump water in said area or any part thereof, or to divert or receive any water pumped from said area except as herein decreed * * *."

Recognizing that the need for water might later cause Moreno to attempt to take water and to make claims contrary to the provisions of the 1929 judgment, it expressly provided: "In the event of any violation on the part of either of said defendants of any provision of this judgment neither advice of counsel, nor urgent need of water supply shall furnish any grounds of excuse or justification whatever for any such violation, and during the continuance of any such violation the right of either of said defendants to directly or indirectly pump any water in said area or receive any water pumped therein shall be suspended * * *" and that "No pumping of water in said area nor diverting of pumped water therefrom by either of said defendants shall ever be deemed adverse to the rights of any of said plaintiffs, nor shall the defense of laches, estoppel or any statute of limitations be ever pleaded by either of said defendants against any of said plaintiffs with reference to any water pumped by either of said defendants in any of said area."

For a good many years after the rendition of the 1929 judgment Moreno respected the limitations imposed by that judgment and adjusted the pumping from the Beaumont-Yucaipa basin to the schedule mentioned. About the summer of 1943, according to the "index well", the water level had dropped to such extent that further diversion of water by Moreno was threatened. Moreno wrote to the Beaumont-Yucaipa Protective Committee asking temporary relief from the 1929 judgment. As a "neighborly accommodation" this request was granted with the understanding that such pumping should never be deemed adverse to the rights of plaintiffs.

After an unsuccessful attempt to have the judgment modified by court action, Moreno then brought this action against the same Beaumont-Yucaipa parties in 1945, in the form of an ordinary quiet title action, alleging generally that plaintiff was the owner of the 752 acres described as "Beaumont-Yucaipa area"; that underlying said acreage there exists a "large, natural underground basin of water" generally known as "Beaumont-Yucaipa basin" which basin is one of six contiguous and adjoining basins, all of which are located within the "Beaumont-Yucaipa area"; that the subterranean waters thus gathered into each of said basins constitutes a separate and distinct water plane from the other basins within the *area* and that the supply and amount of water within the "Beaumont-Yucaipa basin" is dependent largely upon the underground flow of water from the other five sub-basins. It is then alleged that at the time of the acquisition of the 752 acres of land overlying said "Beaumont-Yucaipa basin" by plaintiff, there were two water wells thereon in operation and producing water from said "last mentioned basin"; that thereafter, plaintiff drilled and bored several additional wells upon said land, installed pumping plants and constructed the necessary pipe lines and tunnels to convey water from said basin to the Moreno valley. It is then specifically alleged that "there is no unappropriated surplus water, or any other water, of or within said six basins, or any of them, or within said Beaumont-Yucaipa Area, susceptible or available for additional development or appropriation without depriving the plaintiff corporation of its equitable and reasonable proportion thereof, * * *. That the defendants, and each of them, assert and claim an interest and right adverse to plaintiff in and to the waters of said six basins, and particularly in and to the waters of said 'Beaumont-Yucaipa Basin' and the said 'Beaumont-Yucaipa Area'." Judgment is prayed that defendants be required to set forth the nature of their several claims and that it be decreed that the plaintiff is the lawful owner of the right to continue to take and appropriate and to place to beneficial use from said "Beaumont-Yucaipa basin" the amount or amounts of water it has heretofore taken and appropriated.

Moreno's first amended complaint reiterates the allegations of the original complaint, alleges that there are in fact six contiguous and adjoining sub-basins within the "Beaumont-Yucaipa sub-basin" and claims title to certain specified water rights therein.

The Beaumont-Yucaipa parties answered the first amended complaint and denied generally the allegations thereof and alleged that any and all waters appropriated, produced, taken or extracted by Moreno by or through any wells on the 752 acre tract of land during the period mentioned were so taken under the terms and provisions of the stipulated 1929 judgment, which judgment was attached to the answer as an exhibit, and there was the claim that by said judgment the respective rights of Moreno and the Beaumont-Yucaipa parties were finally determined, settled and adjudicated in and to the subject-matter of this action, i. e., the amount of waters the Moreno was entitled to take from the 752 acre parcel described in its complaint, and that the issues there involved are the same issues attempted to be raised in this quiet title action. A copy of the complaint and answer in the 1926 action was attached as an exhibit.

A second amended complaint was, by leave of court, filed by Moreno in the form of a quiet title action, with the same general allegations. The 1929 judgment was thereto attached and made a part thereof. It is then claimed that the judgment is unjust, illegal and inoperative against the claims of the rights of the plaintiffs and that such invalidity consists of (1) that the judgment is void for uncertainty in that it fails to declare the existence or extent of a common, single, and unrelated subterranean reservoir of water underlying the area described in said complaint; (2) that the judgment is void because it fails to define and specify the amount of water required for use, or that is being used, for beneficial purposes by the respective parties thereto; (3) that it is void for uncertainty in that it does not provide or declare how or in what manner the production, taking and distribution of water by the Moreno would adversely affect the water supply of any or either of plaintiffs; (4) that it is void for uncertainty in that it does not appear how or whether the so-called "barometer well" can measure the effect and needs of the pumping of the wells by Moreno upon the water supply of plaintiffs; (5) that the judgment is void because it violates the public policy of the State of California as declared in Article XIV, sec. 3 of the Constitution of the state in that said judgment wholly fails to define or limit the rights of the parties to the beneficial use of the water supply there involved or to find if all or any part of the existing water supply in the area described in the complaint in that action is required for beneficial uses by the plaintiffs in said action; (6) that the judgment is unjust and inoperative against Moreno because of mutual mistakes of fact of the parties thereto, as follows: (a) that each of the parties to said judgment, at and prior to the date thereof, believed that a single subterranean reservoir of water existed in the area described in the complaint in that action and that pumping of water by any one of the parties to said judgment would deplete or adversely affect the water supply of others in said supposed reservoir; (b) that the parties believed that the readings of the nilometer installed in the "barometer well" would accurately measure the effect of the pumping of plaintiff's wells upon the water levels in that area and upon the existing water supply of the other parties to said judgment; (c) that in truth and fact neither of the beliefs mentioned were in any way true; that pumping by plaintiff from either or any of its said wells will not and cannot affect the wells of any of the other parties to said judgment because of the lower water level of plaintiff's wells and because of the geological and hydrological conditions of said area as set forth. It is then alleged that the area mentioned and described in the judgment is now generally known and referred to by geologists as the "Beaumont-Yucaipa depression" and that said area is situated between certain faults; that in said area there is no single, continuous and interrelated subterranean reservoir for the underground storage of water but on the contrary it is split and divided by major and minor faults resulting in numerous basins being formed in the shape of separate underground water reservoirs, each being independent of the other; that the underground water levels in the several basins are not the same and vary accordingly; that all of plaintiff's wells except the "barometer well" are located in the "Singleton basin" and that water cannot migrate or flow from any of said basins to the others; that the extracting and taking of water from plaintiff's wells does not in any way adversely affect the water supply of the defendants or any of them; that prior to 1942 Moreno believed that its wells in the "Singleton basin" and the wells of defendants in other basins were extracting and producing water from a common basin; that between 1942 and 1945 Moreno discovered that the pumping of its wells was not reflected in the "barometer well" by a corresponding lowering of the water table therein and accordingly in 1945 filed its original complaint in this action and employed competent geologists to make a study and report upon the ground and water conditions existing in the "Beaumont-Yucaipa depression" and that Moreno did not learn of the new matter and facts pleaded in this second amended complaint respecting the underground water conditions in that area until 60 days prior to its offer to file this second amended complaint.

Moreno then filed a third amended complaint by leave of court with the same general allegations and makes the additional claim that the 1929 judgment is void for the additional reasons that the judgment fails to find and adjudicate the amount of water required for beneficial use and being beneficially used by the plaintiffs in that action, and whether there is a surplus of underground water in the area described after supplying the beneficial needs and uses, if any, of the plaintiffs or the amount of such surplus, and for the further reason that the judgment failed to declare the existence of a common underground water basin in the area described in the complaint in that action. It is then alleged that plaintiff did not know, and had no means of knowing, that its belief in the existence of a common basin and natural underground reservoir for the storage of water in said area was a mistaken belief until its said geologists submitted to plaintiff a preliminary report of the geological and hydrological conditions in said area on or about the first day of May, 1947. In considering the demurrer interposed to the third amended complaint by defendants the trial court overruled the demurrer as to the sufficiency of the allegations to authorize the court to declare the 1929 judgment void as contrary to public policy, but held that there were not sufficient allegations to declare the judgment invalid on the ground of mistake.

Moreno then filed a fourth amended complaint elaborating further in this respect, and the demurrer to the fourth amended complaint remains undecided.

In support of the temporary restraining order, in addition to these pleadings enumerated, both parties presented affidavits of eminent geologists, who gave conflicting opinions as to the various geological formations involved in the Beaumont-Yucaipa region, and as to whether the pumping of water from the wells located on Moreno's 752 acres affected the water supply of the Beaumont-Yucaipa parties and whether the said wells were in the Singleton basin or in the Beaumont-Yucaipa basin.

It is the position of the Beaumont-Yucaipa parties that no cause for relief from the 1929 judgment is stated in the pending action and that lacking such statement of a cause of action, no injunction can be supported since on its face the 1929 judgment controls the situation, and that the order granting the preliminary injunction should be reversed.

[1] A preliminary injunction is warranted only if there is on file a complaint which states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction. Bank of America Nat. Trust & Sav. Ass'n v. Williams, 89 Cal.App.2d 21, 23, 200 P.2d 151; Willis v. Lauridson, 161 Cal. 106, 108, 118 P. 530. The essential conditions for granting temporary injunctive relief are that the complaint allege facts which appear to be sufficient to constitute a cause of action for injunction and that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending litigation. 28 Am.Jur. 207, sec. 14. Therefore, if the 1929 judgment is valid and existing and since it was pleaded by both parties to the action, it must be taken into consideration in determining whether or not plaintiff has stated a cause of action for injunctive relief.

[2] Stripped of all unnecessary minutiae, the purpose of the instant action is a collateral attack upon the validity of the 1929 judgment. If, therefore the judgment is valid and not subject to such attack, the restraining order preventing its enforcement is unauthorized. It is well settled in this state that a collateral attack on a judgment will not lie against such judgment unless the judgment is void on its face, that is, void as appears from an inspection of the judgment roll. Svetina v. Burelli, 87 Cal.App.2d 707, 709, 197 P.2d 562; Burrows v. Burrows, 10 Cal.App.2d 749, 751, 52 P.2d 606; 49 Corpus Juris Secundum, Judgments, § 408, page 811. Exception is made in case of extrinsic fraud or mistake. Olivera v. Grace, 19 Cal.2d 570, 575, 122 P.2d 564, 140 A.L.R. 1328; Henderson v. Henderson, 85 Cal.App.2d 476, 478, 193 P.2d 135. An attempt to impeach a judgment by matters de hors the record is a collateral attack. Parsons v. Weis, 144 Cal. 410, 77 P. 1007; People v. Norris, 144 Cal. 422, 424, 77 P. 998. There is no contention or allegation of fraud having been practiced in the instant action. We must be here governed by the rules of collateral attack upon a judgment. Lieberman v. Superior Court, 72 Cal.App. 18, 35, 236 P. 570.

[3] The public policy Moreno claims is violated by the judgment appears in Article XIV, sec. 3 of the Constitution which, in effect, recites that the welfare of the state requires that its water resources shall be beneficially used as fully as possible; that the waste of water in this state is to be prevented; that the conservation of water in this state is to be exercised with a view to the public welfare; that the right of anyone to water from any natural stream or water course is limited to that which is reasonably required for beneficial use; and that a riparian right in a stream or water course extends only to so much of a flow as may be used or required consistently with this section of the Constitution. The 1929 judgment was based upon stipulation. Moreno was as much of an actor in obtaining it as were any of the Beaumont-Yucaipa parties. Whether or not one is entitled in a collateral proceeding to claim that the judgment is void under such circumstances is discussed in Driver v. International Air Race Association, 54 Cal.App.2d 614, 620, 129 P.2d 771. However, it appears that Moreno was and is an exporter of water with no overlying or riparian rights to the waters extracted from its wells, so far as Moreno valley is concerned. Therefore, Moreno had no right to any water for export unless a surplus existed in the basin. The existence of such a surplus was in dispute at the time the 1926 action was instituted, and according to Moreno's own pleadings, if there was a surplus at any time it was converted into a deficit sometime between the time of the 1929 judgment and the institution of the present litigation.

[4-6] From an examination of the judgment roll in the 1926 action it cannot be fairly said that the Beaumont-Yucaipa parties did not present the issues here attempted to be reviewed by this action to declare that judgment void. It was specifically alleged, as heretofore pointed out, that "all of the lands, waters and wells described do lie within the Beaumont-Yucaipa basin" which basin is described with some particularity, and that "each of said 'wells' reaches down into and penetrates the source of supply; that the level of underground water in said basin has been rapidly declining and that the existing uses exceed the normal supply and that "no unappropriated water now remains in said basin." The answer, as indicated, clearly puts in issue these allegations. Since findings were waived, it must be presumed that every fact essential to the support of the judgment was proved and found by the court. Gray v. Gray, 185 Cal. 598, 197 P. 945; 24 Cal.Jur. 956, sec. 194. One of those issues was the contention that there was no "unappropriated waters" available for exportation purposes by Moreno in addition to the amount allowed to be withdrawn under the judgment. The only issue reserved was the question of the geological formation contained in the area, or the allegation relating to the alleged existence of the "Beaumont-Yucaipa basin"

and the extent of the area of land contained within its boundaries and whether said areas did or did not constitute a natural subterranean reservoir. There is nothing in these reservations that would invalidate the judgment as being against public policy or otherwise. The 1929 judgment does not show on its face that it requires or even permits a waste of water or anything other than a full beneficial use of the water involved. In effect, the reservation indicated that the trial court was not going to determine the boundaries of the underground water basin but it was convinced that any excess pumping by Moreno from its wells for diversion purposes directly affected the Beaumont-Yucaipa parties' supply of water which they needed for beneficial use. The rule is that every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it, City of Salinas v. Luke Kow Lee, 217 Cal. 252, 255, 18 P.2d 335, and where the record is silent as to what was done it will be presumed in favor of the judgment that what ought to have been done was not only done but rightly done. Even though the existence of a jurisdictional fact be not affirmed in the record, it will be presumed. So far as the attack upon the judgment as being contrary to public policy is concerned, it is plain that none of the allegations of Moreno's complaint, other than those pleading the judgment roll, can be considered for the purpose of determining whether or not said judgment is contrary to public policy.

[7] Our Supreme Court said in McCreery v. Fuller, 63 Cal. 30, 32: "Where issues are made in a case and decided, whether with or without trial, the judgment is conclusive between the same parties, in any subsequent action for the same cause, as to all questions which were directly involved within the issues made, and which were, or might have been presented and decided", citing cases. And said that: "Such questions cannot be again contested between the same parties in the same or any other court." See, also, Antonelle v. Board of New City Hall Commissioners, 92 Cal.2d 228, 229, 28 P. 270, where it is said that where a case is tried without a jury, and findings are waived, all the issues made by the pleadings are presumed to have been found in favor of the petitioners.

[8] No sufficient grounds are stated which would justify the trial court's order restraining the enforcement of the judgment based upon that ground.

[9, 10] The allegation of mistake, upon which Moreno relies to set aside the judgment, consisted of the belief of Moreno, as well as the belief of the Beaumont-Yucaipa parties "That there existed a subterranean reservoir or basin of sub-surface water in the alleged 'Beaumont-Yucaipa basin', and that plaintiff's pumping, extracting and exporting of water from its wells would and did adversely affect and diminish the water supply of the other parties * * * whereas in fact no such reservoir or basin existed." And as alleged in the fourth amended complaint: "That during the period commencing in the year 1921, and ending in May, 1929, the water level in the so-called 'Barometer Well' had been lowered approximately 10 feet, and because of such lowering both the plaintiffs and the defendant in the said (1926) action concluded and believed that said lowering * * * was due largely to plaintiff's pumping and taking of water from its nearby wells. That because of such conclusion and belief, plaintiff entered into the aforesaid stipulation * * *. That plaintiff's said conclusion and belief and the stipulation agreed to as a result thereof were based on a mistake of fact * * *", as alleged above. 6 Cal.Jur. pp. 78–80, secs. 46–47, considers the code sections on the subject of mistake and recites: " 'The mistake of which a party to a written contract may be heard to complain in equity can arise in only one of three ways: First, it may be a mistake of law * * *; Second, it may be a mistake entertained by the plaintiff with the knowledge of the defendant arising under circumstances which impose the duty upon the defendant to cor-

rect the plaintiffs' error. Defendant's failure to do so is itself a species of fraud and is treated as fraud * * *." The third species of mistake is that defined in section 1640 of the Civil Code, which declares that 'when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. * * *' Sec. 47. A mistake is not operative to render a contract voidable if it affects merely some 'collateral', though material matter, constituting merely a matter of inducement. * * * The authorities recognize the difficulty of determining whether a mistake applies to an essential feature of the contract or to a purely collateral matter. It is firmly established that if the parties enter into a contract under the belief that the subject matter or consideration is in existance, and in effect condition their contract thereon, and, as a matter of fact, it is not in existence, such mistake will enable the party to avoid the contract. This rule, of course, *does not apply to cases where the parties are aware that the existence of the subject-matter is doubtful and contract with reference thereto.*" (Italics ours.)

[11] Applying these rules, no mistake of law is claimed and the second ground is not established. The third ground does not apply under the exception as italicized. 17 Corpus Juris Secundum, Contracts, §§ 135, 144, page 486–487, and 499, states the doctrine as follows: "Where a party enters into a contract ignorant of a fact but meaning to waive all inquiry into it, or waives an investigation after attention has been called to it, there is no mistake in the legal sense. Moreover, mere ignorance of the facts is not necessarily a ground for relief, nor will the courts relieve one from the consequences of his own improvidence or poor judgment. Parties must exercise ordinary diligence in the execution of contracts and are chargeable with such knowledge as diligence would have disclosed, and may not avoid a contract on the basis of mistake where it appears that ignorance of the facts was the result of carelessness, indifference, or inattention. * * * Where, * * * the contract concerns a matter about which there may be some doubt, and it appears that the existence of the thing was not an implied condition, but that the party intended to take the risk, then it is no answer to the enforcement of the agreement that the thing did not actually exist."

[12] There is no question about the belief of Beaumont-Yucaipa parties being that such a water basin did then exist and that the pumping of water by Moreno did affect and was diminishing their water supply and that they still believe these facts. They particularly alleged this belief as a fact in their complaint in the 1926 action. The fact that Moreno so believed at that time is not borne out by the judgment roll in that action. A contrary belief is shown and Moreno's pleadings clearly indicate that this was one of the doubtful or disputable questions which the parties desired to have determined. Whether the waiver of findings on this issue carried the presumption in favor of Beaumont-Yucaipa parties that "all the issues made by the pleadings are presumed to have been found in favor of the petitioners," as held in Antonelle v. Board of New City Hall Commissioners, 92 Cal. 228, 28 P. 270, is problematical in the face of the notation in the judgment by the trial court. However, as between these parties, the question was in doubt and the parties entered into the stipulation and judgment knowing it was in doubt. The failure of the trial court to determine whether there was in fact a natural subterranean reservoir in the alleged Beaumont-Yucaipa basin did not remove such doubt, and the parties, with full knowledge of such doubt, contracted for the stipulated judgment. Failure of the trial court to find on that subject was not fatal to the judgment obtained. Upon the issues presented the court did, in effect, find, as recited in the judgment, that "each of said plaintiffs, as against said defendants, is the owner of the right to take and use water from the lands and water sources alleged in the complaint herein to be owned by such plaintiffs lying within that

certain tract of land specifically described in paragraph XXIII of said complaint and referred to in said paragraph as the 'Beaumont-Yucaipa basin', at least to the extent set forth in said complaint * * * and said right of each of said plaintiffs is paramount to any of the rights of either of said defendants". It further declared that the transportation of water from the Moreno wells did adversely affect the water supply of Beaumont-Yucaipa parties.

After operating under this judgment, as agreed upon, for over 16 years, Moreno now claims that it first discovered its mistake to wit: (1) that the taking of water by Moreno did not adversely affect the Beaumont-Yucaipa parties, which question was adversely determined against it by the judgment and pleadings in the prior action; and (2) that there was no subterranean reservoir in the alleged "Beaumount-Yucaipa basin", which question was left open by the court's statement in the judgment. Whether the water came from a single basin or a series of basins became immaterial so long as the "Beaumont-Yucaipa parties" or rights of the parties were adversely affected thereby, and the trial court had the jurisdiction to make and determine all their respective rights and did so in definite terms by the judgment. Moreno should not, under the circumstances related, be authorized to declare null and void, on the ground of mistake, the judgment under which all parties operated, without a claim of mistake, for such a long period of time, and allowed to re-litigate the issue as to underground water conditions which would necessarily ensue, at great expense, if the pending litigation should go to trial upon the pleadings presented.

The other grounds of complaint are sufficiently disposed of by the pleadings, presumptions, stipulation and judgment in the 1926 action.

The temporary order enjoining defendants from enforcing the judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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94 Cal.App.2d 807

BASSETT et al. v. JOHNSON.

Civ. 14019.

District Court of Appeal, First District,
Division 1, California.

Nov. 28, 1949.

Hearing Denied Jan. 26, 1950.

Action by Thomas Bassett and Myra Bassett against Melvin B. Johnson for breach of contract for purchase of property.

The Superior Court of San Mateo County, Edmund Scott, J., rendered judgment for the defendant, and the plaintiffs appealed.

The District Court of Appeal took additional evidence in the interests of justice, and in an opinion by Peters, P. J., held that the defendant was in default, that deposit could be forfeited, and reversed the judgment.

1. Vendor and purchaser ⚷76, 148

Where the vendors allow the entire amount called for by contract to become due the payment of the price and the tender of the deed become concurrent conditions and the vendors cannot put the purchasers in default until the deed is tendered.

2. Vendor and purchaser ⚷329

In action by vendors against purchaser for breach of contract additional evidence taken on appeal showed that the purchaser had agreed to prepare the deed and that the purchaser, rather than the vendors, was in default.

3. Vendor and purchaser ⚷335

Where the purchaser is in default his deposit may be forfeited. Code Civ.Proc. § 956a; Const. art. 6, § 4 3/4.

4. Appeal and error ⚷891

The general rule that an appellate court will take additional evidence only for the purpose of affirmance and not for the purpose of reversal is not without exceptions, and where additional evidence is so conclusive that it compels the direction of judgment in favor of appellant the additional evidence may be taken. Code Civ.Proc. § 956a; Const. art. 6, § 4 3/4.

5. Appeal and error ⚷891

Where additional evidence taken on appeal is of such a nature that its effect on the appeal is decisive, such additional evidence in the discretion of the court can be, and should be taken, even though a judgment in favor of the appellant is not directed. Code Civ.Proc. § 956a; Const. art. 6, § 4 3/4.

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Albert Waldstein, San Francisco, Edmund J. Holl, San Francisco, for appellant.

Francis N. Foley, San Mateo, for respondent.

PETERS, Presiding Justice.

Plaintiffs, Thomas and Myra Bassett, as owners and sellers of a parcel of real property in San Mateo County, brought this action against Melvin B. Johnson as the buyer of the property, to recover $500 as liquidated damages for Johnson's alleged breach of the agreement. From a judgment in favor of Johnson the Bassetts appeal.

Johnson is a real estate broker and is a partner in the real estate firm of McGee & Johnson, engaged in business in San Carlos. The Bassetts own a piece of real property in San Carlos. Johnson telephoned to the Bassetts and asked for an exclusive listing of the property, which was refused by the Bassetts. Johnson thereupon agreed to buy, and the Bassetts agreed to sell, the property, to Johnson, for $2,500. Johnson then prepared a written contract in the form of a "Deposit Receipt," and this was signed by Johnson and the Bassetts on February 4, 1946. The agreement reads in part as follows:

"Received from Melvin B. Johnson * * * Five Hundred and No/100 Dollars as a deposit on account of purchase price of the following described property * * *

"The total purchase price is Twenty-Five Hundred and No/100 Dollars net and the balance of same is to be paid within 45 days from date hereof, as follows:

"All cash to seller.

"And It Is Hereby Agreed: That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages. * * *

"Time is the essence of this contract, but the time for any act required hereunder may for sufficient cause be extended not longer than thirty days by the undersigned real estate agent."

Johnson signed this agreement both as "Real Estate Agent" and as "Purchaser." He testified that he opened an escrow account with a designated title company, and had the title to the property searched, but that he never deposited the $500 with the title company, nor did he pay that sum to the Bassetts. He stated that he deposited $500 in McGee & Johnson's trustee account, but no corroborating evidence of this alleged transfer was introduced.

Both of the Bassetts testified that during the 45 days following February 4, 1946, they repeatedly requested Johnson to complete the transaction, and that on each such occasion Johnson promised to prepare a deed to the property and to deposit the money, but that he failed to do so.

Johnson denied that he had agreed to prepare the deed, his main defense being that he expected the Bassetts, as sellers, to prepare the deed and to deposit it with the title company. He claimed that, had such a deed been proffered, he was willing to complete the transaction.

Mr. and Mrs. Bassett, during the 45-day period, not only telephoned Johnson but went to the title company and asked if Johnson had deposited the $500 or proffered a deed, and were told that no such deposit or deed had been presented. The Bassetts gave Johnson various verbal extensions on his contract, but on May 1, 1946, wrote to Johnson as follows:

"Dear Sir:

"The terms of the agreement signed by you on February 4, 1946 being for 45 days, and 75 days having elapsed at this date, I will be forced to consider the agreement terminated and your deposit forfeited if no action is taken within 5 days on this letter.

"Yours truly,
"Thomas Bassett"

Admittedly, Johnson received this letter, and admittedly, during the five-day period, he took no steps to deposit the $500 or to otherwise close the deal. His defense was that he was waiting for the Bassetts, as sellers, to proffer a deed.

Based on this evidence, the trial court found as follows: "That on May 1, 1946, Thomas Bassett, by letter, made demand on defendant and cross-complainant for the balance of the purchase price; that pursuant thereto and within the time provided in said demand, said Melvin B. Johnson tendered to said Thomas Bassett and Myra Bassett the balance of the purchase price and demanded from said Bassetts a deed to said property; that said Bassetts refused and still refuse to deliver a deed to said property in exchange for the balance of the purchase price; that during all of the time after the signing of the said agreement said Melvin B. Johnson was ready, willing and able to perform all of the terms and conditions of said agreement on his part to be performed." Based on his finding, judgment was entered in favor of Johnson, and the Bassetts appeal.

[1] On the evidence properly introduced, and found in the record, there is no doubt at all that such judgment would normally be affirmed. The finding that the Bassetts, as sellers, were in default in failing to tender a deed is supported by the testimony of Johnson. The rule is well settled that where the sellers allow the entire amount called for by the contract to become due, the payment of the price and the tender of the deed become concurrent conditions, and the seller cannot put the buyers in default until the deed is tendered. Grimes v. Steele, 56 Cal.App.2d 786, 790, 133 P.2d 874, and cases cited. Normally, therefore, the judgment would be affirmed.

But there is another matter that must be mentioned. In examining the contract of February 4, 1946, this court discovered that that contract had been sent through the mail by Johnson to the Bassetts, and that there was attached thereto a letter of transmittal, that had never been introduced into evidence, and, in fact, had never been mentioned by anyone at the trial. How it got into the record on appeal is by no means clear. That letter is typed on the stationery of McGee & Johnson and reads as follows:

"February 4, 1946

"Mr. Thomas Bassett
"130 Cordova
"San Francisco 12, Calif.
"Dear Mr. Bassett:

"We are enclosing herewith our deposit receipts for your signature. Please return them to us as soon as possible.

"When this deal is ready to close, we will forward deed and escrow instructions to the title company for your signature.

"Yours very truly
"McGee & Johnson
"[Signed] Melvin B. Johnson."

Here is written evidence, which if authentic, and had it been introduced, demonstrates that Johnson, at the inception of the transaction, promised to prepare the deed. Such evidence, if it had been introduced at the trial, and unless explained, would have demonstrated that the finding that the Bassetts were in default for failing to tender a deed was incorrect, and that Johnson's testimony that he had never promised to prepare the deed was false. Faced with this most unusual situation, at the oral argument, counsel were interrogated at length about this letter. At the conclusion of the oral argument, in the interests of justice, and acting pursuant to our constitutional, Art. VI, § 4¾ of the Constitution, and statutory, § 956a of the Code of Civil Procedure, powers, we determined, on our own motion, to take additional evidence relating to the execution, and the circumstances surrounding the execution, of the letter in question. To this end we appoint the Hon. Edmund Scott, Judge of the Superior Court of San Mateo County, and the judge who tried the case, as referee for this purpose. Thereafter, the referee took evidence and made the following finding: "Said letter, dated February 4, 1946, was mailed from the office of McGee & Johnson, on or about said date, and received in due course by the plaintiffs. Said letter was not signed by Melvin B. Johnson, but was typed and signed by Carroll Baldwin, an employe of said Melvin B. Johnson; that said letter was not dictated by said Melvin B. Johnson but was composed by the said Carroll Baldwin, in accordance with similar letters used in the office of McGee & Baldwin [Johnson.] The said Johnson did not personally know the contents of said letter until the letter was shown to him at the hearing before the Referee."

[2, 3] There has also been filed on this appeal a transcript of the evidence taken before the referee. From that record it appears that Johnson testified that there was no carbon copy of this letter in his files. Mrs. Baldwin testified that she always made carbon copies of all letters sent to customers and prospects, and was certain that she followed the customary procedure in reference to the Bassett letter. Johnson admitted giving Mrs. Baldwin the information from which the contract of February 4, 1946, was drafted, but denied dictating the letter of the same date. Mrs. Baldwin testified that the letter was the usual form letter sent by the office in such transactions. This court adopts, as the findings of the court, the above-quoted finding of Judge Scott, and, in addition, finds that, pursuant to the usual custom, a carbon copy of the letter of transmittal was placed in the files by Mrs. Baldwin, and that she had at least ostensible authority to send the letter in question.

This determination of the factual issue is determinative of this appeal. Since it now appears that Johnson promised to prepare the deed, the Bassetts were not in default. Johnson was in default. This being so, the deposit may be forfeited. Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 P. 420. It should be mentioned that prior to the declaration of forfeiture, no tender of any kind was made by Johnson, and that Johnson has made no showing at all under § 3275 of the Civil Code.

[4, 5] We are well aware of the rule that, normally, additional evidence will be taken by an appellate court only for the purpose of affirmance and not for the purpose of a reversal. But that general rule is not without its exceptions. Where the additional evidence is so conclusive that it compels the direction of a judgment in favor of appellant, the additional evidence may be taken. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. In addition where, as here, the additional evidence is of such a nature that its effect on the appeal is decisive, such additional evidence, in the discretion of the court, can be and should be taken even though a judgment in favor of appellant is not directed. In re Estate of Culver, 81 Cal.App.2d 640, 645, 184 P.2d 738; In re Estate of Wirt, 207 Cal. 106, 111, 277 P. 118.

The judgment appealed from is reversed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

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94 Cal.App.2d 902

HARLAN v. SUPERIOR COURT, LOS ANGELES COUNTY et al.

Civ. 17449.

District Court of Appeal, Second District, Division 3, California.

Dec. 2, 1949.

Pauline R. Harlan applied for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of Los Angeles, and another to obtain relief from an adjudication of contempt and sentence for violation of temporary injunction granted in petitioner's action for separate maintenance.

The District Court of Appeal, Shinn, P. J., held that the adjudication of contempt was void because court was without jurisdiction to grant the injunction in absence of factual showing by pleading or affidavit of the grounds for such injunction and because no facts were found which would constitute willful violation of injunction and issued a peremptory writ.

1. Judgment 🔑326

Clerical error in previous order as to a date could be corrected by nunc pro tunc order, but order insofar as it deviated from statement made by court in announcing its decision must be ignored, since such an order cannot validly enlarge upon the actual decision.

2. Husband and wife 🔑293

In action for separate maintenance, court was without jurisdiction to issue a temporary injunction enjoining wife from disposing of or incumbering community property or annoying or molesting husband in absence of factual showing by pleading or affidavit of grounds for such injunction and order adjudging wife in contempt for violation of such injunction was void. Code Civ.Proc. §§ 527, 529.

3. Divorce 🔑87, 206
Husband and wife 🔑293

An application for injunctive relief in action for divorce or separate maintenance is governed by statute authorizing issuance of temporary injunction upon a verified complaint or affidavit showing satisfactorily that sufficient grounds exist therefor. Code Civ.Proc. §§ 527, 529.

4. Injunction 🔑139
Prohibition 🔑16

The provisions of statute authorizing issuance of injunction before judgment upon a verified complaint or affidavit showing satisfactorily that sufficient grounds exist therefor are the measure of the power of trial court in the matter of provisional injunctions, and for the purpose of determining the right to restrain by prohibition, the procedural requirements of the statute go to the jurisdiction of the trial court. Code Civ.Proc. § 527.

5. Prohibition 🔑21

A verified showing of grounds therefor is indispensable to the exercise of injunctive power under rule that prohibition will lie where, though court had jurisdiction over subject matter and parties in the fundamental sense, it had no jurisdiction to act except in a particular manner or to give certain kinds of relief or to act without the occurrence of certain procedural prerequisites. Code Civ.Proc. § 527.

6. Contempt 🔑21

Disobedience of a void order does not constitute contempt.

7. Husband and wife 🔑293

Adjudication of contempt for violation of temporary injunction granted in action for separate maintenance enjoining the parties from disposing of or incumbering community property or annoying or molesting each other was void in absence of finding of facts which would constitute willful violation of injunction.

8. Contempt 🔑63(4)

A finding that one accused of contempt is in violation of an order of court states only a conclusion of law and is not a sufficient finding of facts which would constitute willful violation of order to support a valid adjudication of contempt.

9. Contempt 🔑66(7)

Nothing can be implied in support of an adjudication of contempt and such adjudication will not be permitted to stand unless record unmistakably shows that court found to be true all of the facts constituting contempt of the authority of court.

Cantillon & Glover, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel; Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

SHINN, Presiding Justice.

Pauline Harlan seeks by this proceeding in prohibition relief from a conviction of contempt of court and a sentence of three days in the county jail. The order was made in an action for separate maintenance in which petitioner is plaintiff, and James J. Harlan is defendant. An alternative writ having been issued, respondent superior court demurred to the petition, and James J. Harlan filed an answer.

Upon her verified complaint and affidavit petitioner obtained an order requiring respondent James J. Harlan to show cause why he should not be required to pay support and suit money and be restrained from molesting or interfering with plaintiff or the minor child of the parties. The order to show cause was returnable on June 8, 1949. On June 7, 1949, Harlan filed an affidavit in which he said, "it is desired that wife be restrained" from drinking, using vile language, threatening husband, calling him names, disposing of community property and talking to acquaintances and business associates of defendant in a manner to interfere with his business. There was no showing by answer, cross complaint or affidavit that the wife had committed, or threatened to commit, all or any of the acts with respect to which it was desired to place her under restraint. No order to show cause was issued and no notice was given the wife with respect to any application for an injunction. On June 8th the court made an order which gave the exclusive use of one residence to plaintiff and the use of an automobile and another residence to defendant. Both parties were enjoined as follows: (1) From making derogatory remarks in front of the child; (2) from disposing of or encumbering community property; (3) from annoying, molesting or interfering in the business affairs of the other, and plaintiff was ordered to return all personal effects and business records to defendant.

On July 6th, in another department of the court, in response to an order to show cause, a minute order was made by Judge Eugene P. Fay that "the court finds that plaintiff is in violation of the molestation and interference restraining order heretofore made. Plaintiff is adjudged in contempt of court and is sentenced to three days in the county jail * * * both parties are restrained from in any way molesting, annoying or striking the other or making derogatory remarks concerning the other in the presence of the child." Execution of sentence was suspended on condition that petitioner obey the orders of the court.

On October 14th, the husband filed an affidavit accusing plaintiff of breaking into his residence, removing personal effects, making derogatory remarks in the presence of the child, kicking the defendant, taking his personal effects from his automobile and his duplicate automobile keys. An order was issued directing plaintiff to show cause why she should not be adjudged guilty of contempt and punished for disobeying the order made the *8th day of June*.

[1] On October 27th, before yet another judge, evidence was taken and a minute order was made reading in part as follows: "The court finds plaintiff in violation of order of *July 6, 1949,* and the sentence imposed by Judge Eugene P. Fay goes into effect and plaintiff is ordered to serve three days in the county jail forthwith." A stay of execution was granted, during which our alternative writ was issued. (After the hearing in this court there was presented and ordered filed a copy of a minute order of the trial judge, filed November 17th, 1949, correcting the foregoing order nunc pro tunc to show that plaintiff was found in violation of the order of June 8, 1949, for which she had been cited. The November 17th order differs in other respects from the previous order and from the decision of the court announced at the conclusion of the hearing, as shown by a partial reporter's transcript filed with the minute order, but the corrected order contains no finding of fact. We accept the correction as to the date, which resulted from a clerical error, but must ignore the nunc pro tunc order insofar as it deviates from the statement made by the court in announcing its decision. Such an order cannot validly enlarge upon the actual decision.)

[2, 3] The adjudication of contempt is void for the following reasons: (1) The court was not authorized to issue the temporary injunction of June 8th for the reason that the requirements of section 527 of the Code of Civil Procedure were not complied with. That section reads in part, "An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits, in the other, show satisfactorily that sufficient grounds exist there-

for." An application for injunctive relief in an action for divorce or separate maintenance is governed by these provisions. See McDonald v. Superior Court, 18 Cal. App.2d 652, 64 P.2d 738; cf. Code Civ. Proc., sec. 529. The present case is not one where a question of law exists as to the sufficiency of the facts averred by the applicant to justify an order made in the exercise of the court's jurisdiction. Cf. Kelsey v. Superior Court, 40 Cal.App. 229, 234, 180 P. 662. On the contrary, the present record discloses a complete absence of *any* factual showing by pleading or affidavit upon which the court could have based a finding of the existence or non-existence of grounds for granting the temporary injunction.

[4–6] It has been held that the provisions of section 527 are the measure of "the power of trial courts in the matter of provisional injunctions." United Railroads of San Francisco v. Superior Court, 170 Cal. 755, 759, 151 P. 129, 131, Ann.Cas.1916E, 199. And for the purpose of determining the right to restraint by prohibition the procedural requirements of the section go to the jurisdiction of the trial court. A verified showing is indispensable to the exercise of injunctive power under the rule that "though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, *or to act without the occurrence of certain procedural prerequisites.*" (Emphasis added.) Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 947, 132 A.L.R. 715. Accordingly, because of the failure to observe the procedural requirements of section 527, the court was without jurisdiction to render the order for the alleged violation of which petitioner was adjudged guilty of contempt. Cf. Green v. Superior Court, 65 Cal.App. 237, 223 P. 582; Northcutt v. Superior Court, 66 Cal.App. 350, 226 P. 25; Kelsey v. Superior Court, supra, 40 Cal.App. 229, 236, 180 P. 662. Disobedience of a void order, of course, does not constitute contempt. Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470; In re Carroll, 135 Cal.App. 672, 28 P.2d 84.

[7–9] (2) No facts were found which would constitute wilful violation of either order. A finding that one accused of contempt is in violation of an order of court states only a conclusion of law. Although the affidavit for the order to show cause contained a sufficient statement of facts, there was no finding that any of such allegations was true. Nothing can be implied in support of an adjudication of contempt. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127; In re Donovan, 94 Cal.App.2d 399, 210 P.2d 860, and cases there cited. Such an order will not be permitted to stand unless the record unmistakably shows that the court found to be true all of the facts constituting contempt of the authority of the court. Groves v. Superior Court, 62 Cal.App.2d 559, 569, 145 P.2d 355; In re Meyer, 131 Cal.App. 41, 20 P.2d 732; Merritt v. Superior Court, 93 Cal.App. 177, 269 P. 547; Bakeman v. Superior Court, 37 Cal.App. 785, 174 P. 911; In re Northern, 18 Cal.App. 52, 121 P. 1010.

A peremptory writ will issue.

WOOD and VALLÉE, JJ., concur.

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NATIONAL AUTOMOBILE & CASUALTY INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 14176.

District Court of Appeal, First District, Division 1, California.

Dec. 9, 1949.

Rehearing Denied Jan. 7, 1950.

Hearing Denied Feb. 2, 1950.

Application by Walter Lonnon to recover medical and burial expenses on account of death of his wife, Mabel Lonnon, who accidentally sustained in the course of her employment an injury which resulted in her death. The application was opposed by the National Automobile & Casualty Insurance Company and Saints John Hospital, Ltd. The Industrial Accident Commission made an award for the applicant and increased it ten per cent against the employer, Saints John Hospital, Ltd., because the employer was wilfully uninsured and the National Automobile & Casualty Insurance Company and Saints John Hospital, Ltd., appealed.

The District Court of Appeals, Peters, P. J., affirmed the award and reversed it as to the ten per cent. penalty and remanded the cause with instructions to permit the Saints John Hospital, Ltd., to present evidence as to whether failure to insure was wilful.

1. Administrative law and procedure 🔑793
Workmen's compensation 🔑1939

It was for the Industrial Accident Commission to weigh the evidence respecting the cause of the employee's death.

2. Workmen's compensation 🔑1420, 1488

An award based solely on evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained but evidence which supports an inference of reasonable medical probability is sufficient.

3. Workmen's compensation 🔑1542

Evidence sustained finding of Industrial Commission that the reasonable medical probabilities were that long hours of work aggravated the existing condition of the employee and that the injuries sustained were compensable.

4. Workmen's compensation 🔑1337

In workmen's compensation proceeding where it was clear from the beginning that petitioner was relying upon aggravation of pre-existing injury as well as claimed infection of the arm as cause of death, and employer and partial insurance carrier showed that death was caused by thrombophlebitis and not arm injury and that such condition was aggravated by overwork the employer and partial insurer were not surprised by the theory which they demonstrated, and failure of the petitioner to move to amend petition to conform with the proof did not invalidate the award, although it would have been better practice. Labor Code, § 5709.

5. Workmen's compensation 🔑1753

In workmen's compensation case the ultimate issue was not whether employee had died of an arm infection but whether death resulted from an injury arising out of and in the course of the employment, and where a finding was made on such issue there was no failure to find on a material issue.

6. Administrative law and procedure 🔑459
Workmen's compensation 🔑1096

The Industrial Commission could take judicial notice of its own records as respects whether an employer had become a self-insurer in whole or in part. Labor Code, §§ 3700–3714, 4554.

7. Administrative law and procedure 🔑513
Constitutional law 🔑301
Workmen's compensation 🔑1814

Where at no time during the hearings before the referee was the question of wilful failure to insure raised, direction by panel of the Industrial Commission that award against employer be increased ten per cent as a penalty for wilful partial uninsurance was in excess of the powers of the Commission and a denial of due process of law. Labor Code, §§ 3700–3714, 4554.

8. Administrative law and procedure 🔑669
Workmen's compensation 🔑1864

Where petition for rehearing asserted that findings of Industrial Commission were unsupported by evidence and that in all respects the Commission had acted without and in excess of its powers such general grounds preserved the point that the Commission had acted in excess of its powers and denied the employer due process of law in increasing an award ten per cent. on account of wilful partial uninsurance where no such issue had been raised before the referee. Labor Code, §§ 3700–3714, 4554, 5904.

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Henry G. Sanford, San Francisco, attorney for petitioner National Automobile & Casualty Ins. Co.

Henry G. Sanford, Joseph A. Brown, San Francisco, attorneys for petitioner Saints John Hospital, Ltd.

T. Groezinger, Alfred C. Skaife, San Francisco, attorneys for respondents.

PETERS, Presiding Justice.

Walter Lonnon was the husband and is the heir at law of Mabel Lonnon, a nurse who died during the time she was acting as supervisor of nurses for Saints John Hospital in San Francisco. Neither Walter Lonnon, nor the two adult children of the parties, was in fact dependent on Mabel Lonnon. Lonnon filed an application to recover medical and burial expenses, the application alleging that in the course and scope of her employment Mabel had "accidentally sustained a laceration of the arm, followed by infection," and died as a result thereof. After a hearing, the Commission found that Mabel sustained an injury arising out of and occuring in the course of her employment in that "Said deceased was on her feet for long hours at a time while performing her said services and such activities aggravated or precipitated an acute attack of thrombophlebitis, proximately causing her death on 17 October 1947." Based on this finding, an award was made for disability benefits payable prior to the death of Mabel, and for burial, medical and legal expenses. Inasmuch as it appeared that the hospital was carrying a limited insurance indemnity policy, part of the award was made against the insurance carrier and part against the hospital. It appears from the record that after the referee had submitted his proposed findings to a panel of the Commission, the panel instructed the referee to include findings that the hospital was wilfully uninsured, and to increase all awards against it ten per cent as a penalty. This was done, and the awards made. Both the hospital and its carrier petition for a writ of review.

The first major contention made is that the award is void inasmuch as the application filed by the husband averred that death was caused by an arm infection, while the Commission found that death was caused by thrombophlebitis aggravated by the employment. This is claimed to be a fatal variance. No findings were made at all as to the arm infection, and petitioners urge that there was thus a failure to find on a material issue. It is seriously contended that there was no evidence at all of an aggravation of the thrombophlebitis caused by the employment.

[1–3] There is no necessity of reviewing the record at length. The record shows that prior to her employment by Saints John Hospital, Mabel suffered from thrombophlebitis of the legs, and that her death was caused by a shower of emboli caused by the thrombophlebitis which lodged in her heart, brain and lungs. There is also no doubt that Mabel did cut her arm in the course and scope of her employment, and that the arm became infected. This condition healed shortly after her admittance to the hospital as a patient. The evidence also showed that this employee was required to be on her feet long hours while working for the hospital, and that she frequently worked long hours overtime, sometimes for the hospital but more frequently for doctors. The medical testimony was to the effect that the condition from which this employee suffered was aggravated by being on her feet for long hours. Petitioner urges that this evidence amounted to no more than a guess or conjecture on the part of the witnesses, and is not sufficient to support the challenged finding. While the evidence is not as strong as might be desired, this is partially explained by the fact that the attending physicians were both connected with the Saints John Hospital. Both doctors admitted that prior to her collapse in August of 1947, Mabel Lonnon was working too long hours and being kept on her feet too long, and that they had warned her against overwork and to get off her feet because such work was dangerous for one suffering from thrombophlebitis of the legs. In response to a direct question from the referee as to whether the long hours worked by Mabel immediately preceding her collapse had aggravated the thrombophlebitis condition, Dr. Lista replied: "Well, of course, being on one's feet too many hours would have a definite tendency to aggravate the condition." He also testified that the weakened condition of the body caused by overwork "aggravates any existing pathology," and that the chain of events where thrombophlebitis exists is frequently an embolism and coronary occlusion, and that this can be accelerated by lowered resistance caused by overwork. Dr. Morton admitted that, in Mabel's condition, it would be best for her to have kept quiet and off her feet, and that she should not have been working at all prior to her collapse. It was for the Commission to weigh this evidence. Union Oil Co. v. Industrial Accident Commission, 211 Cal. 398, 404, 295 P. 513. While an award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained, Travelers Ins. Co. v. Industrial Accident Commission, 33 Cal.2d 685, 687, 203 P.2d 747, here the evidence went beyond this and supports an inference of reasonable medical probability. That is all that is required. Fireman's Fund Indem. Co. v. Industrial Accident Commission, 93 Cal.App.2d 244, 208 P.2d 1033. Under the evidence, the Commission could and did find that the reasonable medical probabilities were that the long hours of work aggravated the pre-existing condition—a compensable injury. Thoreau v. Industrial Accident Commission, 120 Cal.App. 67, 70, 7 P.2d 767; Abelseth v. Industrial Accident Commission, 8 Cal.App.2d 270, 272, 47 P.2d 516.

[4] But little need be said about the claimed variance. The Commission is not bound by strict rules of procedure. Section 5708, Labor Code. An examination of the record demonstrates that, from the very beginning of the hearing, it was obvious that the petitioner was relying upon aggravation of a pre-existing injury as well as the claimed infection of the arm as the cause of death. It was petitioners' witnesses who demonstrated that death was caused by thrombophlebitis and not by the arm injury, and it was also petitioners' witnesses who proved that such condition was aggravated by overwork. Petitioners were not surprised by this theory. Although it would have been better practice to have moved to amend to conform to proof, the failure to do so was a mere informality which does not invalidate the award. Section 5709, Labor Code.

[5] There is no merit in the contention that there was a failure to find on a material issue, because the ultimate issue was not whether Mabel died of an arm infection, but whether death resulted from an injury arising out of and in the course of the employment. Such a finding was made.

Saints John Hospital objects to the ten per cent penalty imposed on it. The insurance carrier admitted that it had issued a limited policy of insurance whereby it agreed to pay disability indemnity compensation and burial costs, and the employer—Saints John Hospital—assumed all liability for medical and surgical treatment and costs. The policy was not introduced into evidence. The Commission found that the employer was wilfully uninsured and increased the award against the hospital an additional ten per cent. In so acting, the Commission purported to act pursuant to § 4554 of the Labor Code. That section provides: "In case of the wilful failure by an employer to secure the payment of compensation, the amount of compensation otherwise recoverable for injury or death as provided in this division shall be increased ten per cent; but such increase of award shall in no event exceed $1,000. Failure of the employer to secure the payment of compensation as provided in Article 1 of Chapter 4 of Part 1 of this division is prima facie evidence of wilfulness on his part."

[6] There seems to be no direct provision of the statute for the issuance of such a limited policy. However, there are detailed provisions whereby an employer can become a self-insurer. It may be assumed that these provisions, §§ 3700–3714, Labor Code, authorize an employer to become a self-insurer in whole or in part, but, before an employer can avail itself of such privilege, it must secure a certificate of consent from the Commission, § 3700, and the Commission may require the employer to deposit a bond or securities in an amount to be fixed by the Commission. There is no contention that any such procedure was here followed by the Saints John Hospital, and the Commission could undoubtedly take judicial notice of its own records, which would demonstrate that no such procedure was followed. But, under the terms of § 4554 above quoted, the failure to follow such procedure is only prima facie, not conclusive, evidence, of wilful failure to insure, and it is only in cases of "wilful failure * * * to secure the payment of compensation" where the Commission is entitled to impose the ten per cent penalty.

[7] The record in this case demonstrates that at no time during the hearings before the referee was the question of wilful failure to insure raised. It came into the case after the referee had submitted his proposed findings, which contained no reference to this issue. The panel, without further hearing or the taking of any further evidence, instructed the referee to include a ten per cent penalty against the hospital. Thus, even though it appears that the hospital was partially uninsured, it also appears that at no time was the hospital given an opportunity to be heard on the issue of whether it acted wilfully in failing to insure. While its failure to insure creates a prima facie case of wilfulness, it should have been given an opportunity to show, if it could, that such failure was not wilful. It is too clear to require further discussion that failure to give the hospital an opportunity to be heard on this issue constituted a denial of due process, and requires the annulling of this portion of the award.

[8] The major defense of the Commission on this point is that this issue was not specifically raised on the petition for rehearing, and, for that reason, cannot now be considered. Section 5904, Labor Code. While the point was not urged in that petition as clearly as might be desired, the petition did aver that all of the findings, which necessarily included the one here involved, were unsupported by the evidence, and alleged that, in all respects, the Commission acted without and in excess of its powers. In view of the fact that a deprivation of a constitutional right is involved, these general grounds should be held to be sufficient to have preserved the point.

The award is affirmed in all respects except as to that portion of the award imposing a ten per cent penalty on petitioner Saints John Hospital. That portion of the award is annulled. The case is remanded to the Commission with instructions to permit the petitioner Saints John Hospital to present evidence, if any it has, that its failure to insure was not wilful, and to make its findings upon such evidence and in light of the provisions of § 4554 of the Labor Code.

WARD and BRAY, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

95 Cal.App.2d 4

FALCONER v. FALCONER.

Civ. 17241.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1949.

Divorce action by Arthur Henry Columbus Falconer against Eleanor Winifred Hernandez Falconer.

Plaintiff filed an affidavit requesting a modification of the divorce decree, and striking therefrom that portion granting custody of the children to defendant, and requiring plaintiff to pay for their support.

The Superior Court, Los Angeles County, Percy Hight, J., denied plaintiff's motion and directed plaintiff to pay to defendant the delinquent and modified support money, and plaintiff appealed.

The District Court of Appeal, Wilson, J., held that plaintiff, having invoked the jurisdiction of the court to determine the question of custody and support of his children, could not thereafter deny that court had jurisdiction to make an order on the subject presented by his own pleadings, and fact that defendant and minor children were domiciled outside of state of California did not invalidate divorce decree, and affirmed the order.

1. Divorce ⚿291, 302, 308

Where plaintiff husband in divorce action agreed to allow wife, who was in Mexico, to retain custody of children and agreed to make monthly payments for children's support, and defendant relying on agreement voluntarily filed her appearance in action and consented that cause be heard as a default, and 7 days after entry of final decree, plaintiff accepted judgment and acted on it by remarrying, plaintiff was estopped from objecting to judgment which embodied his agreement, and could not deny that court had jurisdiction to make an order on the subject presented by his own pleadings.

2. Divorce ⚿291

Where a plaintiff invokes the jurisdiction of a court to determine the question of custody and support of his children, he may not thereafter deny that the court has jurisdiction to make an order on the subject presented by his own pleadings.

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Frank Aspinwall, Fontana, for appellant.

Levy, Bernard & Jaffe, Los Angeles, for respondent.

WILSON, Justice.

This is an action for divorce. Plaintiff, in his amended complaint, alleged that the minor children of the parties were in the care and custody of defendant in Mexico City, Mexico; that for a long time he had been paying for their support $45 American money on the 10th, 20th and last day of each month; that he was willing and agreed to continue such payments, and agreed that defendant have and retain the custody and care of the children until further order of the court should become necessary by reason of changed circumstances.

The complaint, summons and amended complaint were delivered to defendant in Mexico City. She filed in the action an appearance and waiver, reciting that she had received copies of said documents; that she had read and understood their contents, and entered her appearance in the action and requested that it be heard as a default matter. The action was so heard. An interlocutory judgment of divorce was entered on January 9, 1947, adjudging that defendant have the custody of the children and that plaintiff pay to defendant for their support the sums which he had agreed in his pleadings to pay. The final judgment of divorce was entered on February 10, 1948.

On October 18, 1948, plaintiff filed an affidavit requesting a modification of the decree by striking therefrom that portion granting custody of the children to defendant and requiring plaintiff to pay for their support. After the issuance of an order to show cause, based on the affidavit, defendant filed a motion for the payment of her costs and attorney's fees in defending against the order to show cause, together with an affidavit reciting that plaintiff was in arrears in the payment of the support of the children as ordered by the court. An order was issued directing plaintiff to show cause why he should not be adjudged in contempt for having failed to make such payments.

Upon the hearing of the two orders to show cause plaintiff's motion to vacate portions of the judgment was denied. The court found plaintiff to be in arrears in the sum of $1,350 and modified the order for support so as to direct him to pay to defendant the sum of $50 per month for the support of the children in addition to the delinquent amount.

Plaintiff has appealed from the order requiring him "to make certain payments to the defendant for the support of the parties' minor children living in the country of Mexico."

Since plaintiff has not appealed from the order insofar as it denies his motion to strike from the decree that portion awarding custody of the children to defendant need not be discussed.

Plaintiff contends that since defendant and the minor children were domiciled outside the state of California and at no time were personally within this state, the court was without jurisdiction to require him to contribute to their support. In his pleadings he expressly agreed to continue payments for such purpose.

[1, 2] Relying on his agreement, defendant voluntarily filed her appearance in the action and consented that the cause be heard as a default. Seven days after entry of the final decree plaintiff accepted the judgment and acted upon it by remarrying. By reason of (1) his consent to support the children, as expressed in his pleadings, which may be presumed to have been one of the inducements for defendant's voluntary appearance in the action, and (2) his accepting the fruits of the judgment by remarrying, he is estopped from objecting to the judgment which embodied his agreement. When a plaintiff invokes the jurisdiction of a court of this state to determine the question of custody and support of his children he may not thereafter deny that the court has jurisdiction to make an order upon the subject presented by his own pleadings. Maloney v. Maloney, 67 Cal.App.2d 278, 279, 154 P.2d 426.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

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95 Cal.App.2d 46

RIDGWAY v. RIDGWAY et al.

Civ. 17119.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1949.

Rehearing Denied Jan. 3, 1950.

Hearing Denied Feb. 8, 1950.

Action by Loretta Ridgway, as special administratrix of the estate of John L. Ridgeway, deceased, against Claude A. Ridgway and others to quiet title.

The Superior Court of Los Angeles County, Otto J. Emme, J., rendered a judgment for defendants, and plaintiff appealed.

The District Court of Appeal, McComb, J., held that the findings of the trial court were sustained by the evidence and affirmed the judgment.

1. Deeds 🔑208(1)

Finding that deeds conveying property to children were delivered to the grantees was sustained by the evidence. Civ.Code, §§ 1059, subd. 2, 1217.

2. Appeal and error 🔑989

On appeal conflicting inferences and testimony unfavorable to the appellee must be disregarded.

3. Trusts 🔑44(2)

Testimony showing that deeds were delivered with intent of conveying all of the grantors' right, title and interest in their property to the grantees free of any trust or claim sustained finding that after the deeds were delivered the grantees held the title to the property in fee simple absolute and that a trust was not created.

4. Quieting title ⊂⇒52

In action to quiet title, where the evidence showed that the plaintiff had no right, title or interest in or to the property a decree declaring that the defendants had title and enjoining plaintiff from further setting up claim thereto was proper form of judgment, although the defendants had filed no cross-complaint.

Roland Maxwell and Paul H. Marston, Pasadena, for appellant.

Paul R. Hutchinson, Los Angeles, and Launer, Chaffee & Launer, Fullerton, by Paul R. Hutchenson, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff's decedent, John L. Ridgway, filed an action against defendants to quiet title to certain real property. While the action was pending, Mr. Ridgway died and Loretta Ridgway, special administratrix of his estate, was substituted as plaintiff herein. After trial before the court without a jury judgment was entered in favor of defendants decreeing that plaintiff had no interest in the property and enjoining her from asserting any right thereto. From this judgment plaintiff appeals.

The evidence being viewed pursuant to the rules set forth in the In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424, and Shaver v. Canfield, 21 Cal.App.2d 734, 736, 70 P.2d 507, the record discloses the following facts:

Decedent and Anise Ridgway were married in 1882. There were five children of the marriage who are defendants in the present action. Subsequent to their marriage decedent and his wife lived in Oklahoma until they came to California in 1908. They lived together here until the date of her death in 1942. In 1940, decedent and his wife told their son Claude that they desired to transfer all of their property to their children, and asked him if he knew anyone they might consult regarding the matter. At this time decedent was 78 and his wife was 80 years of age. In October, 1940, decedent and his wife went to an attorney's office where they gave instructions to him to prepare deeds transferring the property to their children. Subsequently on May 3, 1941, in the office of the attorney, decedent executed the deeds which had been prepared, told the attorney to keep the deeds and to deliver them to Claude Ridgway, their son. Sometime later on the same day this was done. Claude Ridgway in turn gave the deeds to his sister, Delpha, who placed them in her safe deposit box and in February, 1947, the deeds were placed of record. At the same time Anise Ridgway had deeded all of her interest in the property held by her husband and herself to John L. Ridgway, her spouse. On June 19, 1942, decedent's wife, Anise Ridgway, died. On January 1, 1943, decedent married Loretta Ridgway. On March 19, 1947, the present action was filed by decedent. In July, 1947, he was adjudicated incompetent and on December 17, 1947, he died.

[1] *Questions:* First: *Was there substantial evidence to sustain the following findings?*

(a) That the deeds here in question were delivered to the grantees.

This question must be answered in the affirmative. The finding is supported by the evidnece hereinafter set forth and these rules of law:

(1) An unrecorded instrument is valid as between the parties and those who have notice thereof. (Section 1217, Civil Code.)

(2) A grant deed not actually delivered into the possession of the grantee is deemed constructively delivered where it is handed to a stranger for the benefit of the grantee and his assent made known or presumed. (Section 1059, subsection 2, Civil Code.)

Kenneth E. Morrison, the attorney consulted by decedent and his wife, gave testimony regarding his conversations with them. They asked if it would be possible to give their property to their children and make a will for what was left after deeding out the property. The attorney advised them it would be possible to deed their property to the children, but they must understand that in deeding the property, the deeds must be delivered. This would mean that if the children desired to record the deeds decedent and his wife would lose complete control of the property, and he suggested that because of the seriousness of the matter they should think it over and discuss the matter with him later. He testified that two more conversations followed relative to the disposition of their property during the period from October, 1940, to May 3, 1941. Thereafter, pursuant to the request of decedent and his wife, attorney Morrison prepared deeds naming the children as grantees, and on May 3, 1941, these deeds were executed by decedent in the attorney's office, at which time he told them the deeds must be delivered. He also stated that if they were delivered and the grantees desired to record them the grantors would lose control of their property. Mr. and Mrs. Ridgway, Sr. stated they understood the matter and desired it to be that way.

After executing the deeds they were handed to attorney Morrison with instructions to deliver them to Claude Ridgway. This was done the same day and thereafter Claude Ridgway gave the deeds to his sister, Delpha, who in turn placed them in a safe deposit box where they remained until they were recorded February 3, 1947. Claude Ridgway testified that while he was taking his mother and father home from attorney Morrison's office after they had signed the deeds, his mother said to him: "Well, we don't own any more property. We have given it all to you children."

[2] The foregoing testimony in conjunction with rules (1) and (2), supra, without question sustain the trial court's finding that the deeds were delivered to the grantees. Conflicting inferences and testimony we must, of course, on appeal disregard.

(b) That after the deeds were delivered the grantees held the title to the property in fee simple absolute, and that a trust was not created.[1]

[3] This question must likewise be answered in the affirmative. The testimony set forth above clearly shows that the deeds were delivered with the intent of conveying all of the grantors' right, title and interest in their property to the grantees free of any trust or claim whatsoever. Such being the case the testimony supports the questioned finding.

Second: *Did the trial court err in granting defendants affirmative relief, since a cross-complaint was not filed in the action?*

[4] This question must be answered in the negative. As part of its judgment the trial court made the following order: "It is further ordered, adjudged and decreed that the substituted plaintiff herein, Loretta Ridgway, as special or general administratrix of the estate of John L. Ridgway, deceased, at no time has had, nor does she now have, any right, title or interest in or to said properties, or any part thereof, and she should be and is enjoined from asserting any right, title or interest therein." Such an order is

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[1] The trial court found: "It is true that on May 3, 1941, the said John L. Ridgway and the said Anise Ridgway, his wife, desired to transfer and deed all their right, title and interest in and to said properties to their children and grandchildren hereinafter mentioned and in the manner and form hereinafter described; that it was their intention and purpose at said time to make absolute transfer and conveyance of the legal title to said properties to said persons, and to then and there relinquish all of their right, title and interest therein, and it was their intent to deliver deeds and good and sufficient instruments of conveyance to said persons at said time, and thereafter leave said persons in exclusive control of the same and to relinquish any further right or control of the same. It is true that on said date said deeds and instruments of conveyance were prepared at their special instance and request and with full knowledge of the effect thereof, and were delivered into the possession and control of the defendants herein with the intent and for the purpose of transferring title and control to the defendants, and that ever after said time the said John L. Ridgway had no right, title or interest in or to any of the properties hereinafter described; and it is true that the said properties were thereafter owned in fee simple title absolutely by the defendants as hereinafter described."

correct. In an action to quiet title, even though defendant does not file a cross-complaint or ask for any affirmative relief, a decree declaring that defendant has title, and enjoining plaintiff from further setting up a claim thereto, is a proper form of judgment. (Wolf v. Gall, 174 Cal. 140, 141, 144 et seq., 162 P. 115; cf. California Public Imp. Securities v. Porter, 121 Cal.App. 670, 674, 9 P.2d 877.

In view of our conclusions it is unnecessary to attempt to demonstrate that the delivery of the deed did not have the effect of creating a trust.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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95 Cal.App.2d 31

HALPERIN v. GUZZARDI.

Civ. 17229.

District Court of Appeal, Second District,
Division 2, California.

Dec. 9, 1949.

Hearing Denied Feb. 2, 1950.

Action by Alice F. Halperin against Walter Guzzardi for breach of contract to convey realty.

The Superior Court, Los Angeles County, D. Oliver Germino, J. (from Merced County, presiding under designation of the Chief Justice as chairman of the Judicial Council), entered judgment for the defendant, and the plaintiff moved for a new trial.

The motion was heard by Clarence M. Hanson, J., who entered an order granting the motion, and the defendant appealed.

The District Court of Appeal, Moore, P. J., held that, the trial court having omitted to make a finding on material allegation of defendant's answer that by reason of the allegations in the plaintiff's specific performance case, and the sustaining of a general demurrer and the consequent judgment of dismissal, the issues in the present action were res judicata, the granting of a new trial by the successor judge was not an abuse of discretion, and affirmed the order.

1. New trial 🔑59

In purchaser's action for breach of contract to convey realty, where trial court found that husband's delivery of acceptance of purchaser's offer was conditional on wife's acceptance, and that no agreement between husband and purchaser for sale of realty was made, but brokers testified there was no reservation with respect to delivery of acceptance to purchaser, husband tried to be released from sales agreement, and trial court omitted to make finding on husband's res judicata allegation, granting of new trial by successor judge was not an abuse of discretion.

2. Vendor and purchaser 🔑17

The fact that a promise to sell was given may be shown by any words or acts which indicate assent and even an offer accepted in silence may be sufficient to bind the alleged offeree.

3. New trial 🔑21

On considering a motion for a new trial, judge to whom motion is addressed is not bound by either verdict or finding, but has duty to review record of trial, and if he concludes that a fair trial was not had he must grant motion even though there is substantial evidence to support the findings. Code Civ.Proc. § 662.

4. New trial 🔑114

Successor judge to whom motion for new trial is addressed stands in shoes of his predecessor in case, and has same power and is charged with same duty with respect to weighing evidence and in granting or denying motion as was vested in judge who tried case. Code Civ.Proc. § 662.

5. Estoppel 🔑3(2)

Where trial court sustained general demurrer and entered judgment of dismissal in purchaser's action for specific performance of contract to convey realty, and purchaser brought action for breach of contract, she was not bound by her allegation of value in specific performance complaint and testimony of witnesses other than purchaser could be received.

Zagon, Aaron and Sandler, Los Angeles, for appellant. Albert Levitt, Hollywood, of counsel.

Lyman A. Garber, Beverly Hills, for respondent.

MOORE, Presiding Justice.

The question for decision is whether there was an abuse of discretion in granting the motion for a new trial.

On February 19, 1946, appellant and his wife Carolyn were owners of lot 8 of a tract in Beverly Hills. On that day appellant executed his acceptance of respondent's offer of $42,500 for the property. Fifteen hundred dollars were paid with the offer whereby respondent promised to pay the further sum of $13,500 to execute a trust deed and note for $10,500 and to take the property subject to a first mortgage. The offer was written in triplicate on the "Standard Form Deposit Receipt", one copy of which was retained by respondent while the other two were presented by appellant's brokers, Prindle and Campbell, to him. After signing the attached acceptance in duplicate, appellant kept one and handed the other to campbell who thereafter assisted respondent to open an escrow with a responsible bank where she, in conformance with her offer signed the necessary papers and deposited the amount she was required to pay under the contract. Appellant never signed the escrow instructions or delivered a conveyance of the title or otherwise attempted to carry out his agreement. He testified that when he signed the acceptance, he instructed Campbell not to deliver it to respondent until Carolyn had signed it. Although the latter did not sign the writing, Campbell notified respondent of appellant's acceptance and delivered the third copy to the escrow. Upon appellant's refusal to convey lot 8 to her, she instituted an action for specific performance.

Upon respondent's discovery that the title stood in the names of appellant and his wife as joint tenants, that suit was dismissed without prejudice and this action was commenced to recover damages for breach of contract. The trial court made findings that (1) appellant subscribed his name to a writing such as hereinabove described and delivered it to his own agent to be held until such time as Carolyn agreed to join in the execution thereof; (2) she never signed the instrument; (3) the writing with appellant's signature was never delivered to respondent or her agent; (4) appellant refused to give respondent a deed to lot 8; (5) appellant did not act in bad faith in such refusal, but acted in good faith; (6) he was "under no obligation to deliver a deed to plaintiff"; (7) "plaintiff was not damaged in * * * any sum or at all by any act, conduct or omission on the part of the defendant." The court concluded that there was no agreement between respondent and appellant for the sale of lot 8 or any interest therein.

Judgment was duly entered on December 27, 1948, awarding appellant his costs. Thereafter, Notice of Intention to Move for New Trial upon the statutory grounds was served and filed. By reason of the fact that the judge who had presided at the trial had terminated his assignment by the Judicial Council to serve on the court below, the hearing of the motion was transferred to department 34 of that court where it was heard by another judge who entered an order granting the motion. From such order comes this appeal.

To justify such decision it is necessary now to ascertain whether there was such a substantial error committed by the trial judge as would warrant his successor granting a new trial. To this end it is observed that by her offer and its acceptance and by her compliance with all its terms nothing remained for respondent to do to be entitled to a conveyance. Inasmuch as the decision as to whether the successor judge abused his discretion revolves about the question as to whether the evidence shows there was or was not executed a contract of purchase and sale, it became necessary for him to consider the evidence in its entirety.

[1, 2] Viewed from the standpoint of a nisi prius court the preponderance of the proof indicates that appellant unqualifiedly accepted the offer of respondent. Upon receiving two copies of the offer signed by respondent, the brokers proceeded to the home of appellant to obtain his acceptance. Both brokers testified that there was no reservation with respect to the delivery of the acceptance to respondent. While the trial court found that Guzzardi testified he told the brokers to hold the writing until after he had talked further with Carolyn, the contradictory testimony of the two brokers in conjunction with appellant's acts in trying to be released from the sale agreement and in refusing to join in the escrow was reasonably sufficient to induce the successor judge to conclude that a new trial should be granted. It is not reasonable to believe that such request as was made of the brokers to "help him get out of the deal" would have been made if appellant had not authorized the delivery of a copy of his acceptance to respondent or had not acquiesced upon learning of such delivery. In the absence of indisputable proof of a reservation by appellant the contract of sale was complete when he returned the acceptance with his signature to the brokers. The fact that a promise to sell was given may be shown by any words or acts which indicate assent and even an offer accepted in silence may be sufficient to bind the alleged offeree. Wood v. Gunther, 89 Cal.App.2d 718, 730, 201 P.2d 874; Rest., Contracts, sec. 52b. Appellant's inaction on learning that Mr. Campbell and respondent had opened an escrow and that she had deposited in the escrow so huge a sum is especially significant. Under such circumstances, if he had not actually consented to a delivery of the executed acceptance a reasonably honest person would have rebuked the broker and have advised the purchaser of the alleged reservation. Also, if he had not intended a consummation of the deal he would not have kept one of the two copies he had signed and have returned the other to the broker. A reasonably prudent man would have kept both for his wife's subscription.

[3-5] Appellant complains that the successor judge ignored the findings before him. On considering the motion for a new trial the judge to whom the motion is addressed is not bound by either verdict or findings. It is his duty to review the record of the trial and, if he then concludes that a fair trial was not had, he must grant the motion even though there is substantial evidence to support the findings. He stands in the shoes of his predecessor in the case and has the same power and is charged with the same duty with respect to weighing the evidence and in granting or denying the motion as was vested in the judge who tried the case. Code Civ.Proc. sec. 662; Woods v. Walker, 57 Cal.App.2d 968, 972, 136 P.2d 72; City of Long Beach v. Wright, 134 Cal. App. 366, 372, 25 P.2d 541. The successor judge pertinently observed that the finding that no damage had been sustained by respondent was derived from the erroneous theory that she was necessarily bound by her allegation of value in the specific performance complaint. This is a totally different law suit and testimony of witnesses other than respondent may be received. See Telefilm, Inc. v. Superior Court, 33 Cal.2d 289, 201 P.2d 811.

Finally, following the trial of the action, the court omitted to make a finding upon a material allegation of the defendant's answer, to wit, that by reason of the allegations in the specific performance case, the sustaining of a general demurrer and the consequent judgment of dismissal the issues in the instant action "are now res judicata." This is an allegation of fact, impliedly denied and required a finding. By reason of the court's failure to make such finding the successor judge might well in the exercise of a sound discretion have granted a new trial.

Order affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 910

WOODS et al. v. EITZE et al.

Civ. 17147.

District Court of Appeal, Second District,
Division 2, California.
Dec. 5, 1949.

Rehearing Denied Dec. 20, 1949.
Hearing Denied Feb. 2, 1950.

Samuel E. Woods and Gertrude Woods brought action against James Edward Eitze, Jr., a minor, and others to recover for injuries sustained by Gertrude Woods when struck by an automobile while she was walking across boulevard.

The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered a judgment on a verdict for plaintiffs for $5,000, and rendered an order granting a new trial to plaintiffs on issue of damages alone, and the defendants appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment except as to single issue of damages, and affirmed the order granting a new trial on issue of damages, holding that evidence sustained jury's findings that driver of automobile was negligent and that Mrs. Gertrude Woods was not contributorily negligent, that Gertrude Woods was not contributorily negligent because though she was outside boundaries of unmarked crosswalk, that giving of certain instruction was not error, and that admission of certain evidence was not error.

1. Automobiles 🔑244(6, 50)

In action for injuries sustained by pedestrian when struck by automobile at night while pedestrian was attempting to cross boulevard, evidence sustained findings that motorist was negligent and that pedestrian was not contributorily negligent.

2. New trial 🔑9

Where a jury finds defendant liable for damages, but verdict is for an amount so small in comparison with expense incurred by plaintiff that it is apparent that jurors who believed defendant was not negligent, surrendered their opinions in exchange for consent of other jurors to an award disproportionate to plaintiff's out of pocket expense, so that verdict is plainly a "compromise verdict", a new trial limited to the issue of damages should not be granted.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Compromise Verdict".

3. New trial 🔑9

Trial court in its discretion may grant a new trial on issue of damages alone where sum awarded is substantial and to a certain extent compensatory, though insufficient, but not so trifling in amount that it appears that jury stultified itself by bargaining grossly inadequate damages for nonexistent liability.

4. New trial 🔑9

A verdict of $5,000 to one who suffered fractures of several bones, rupture of liver, concussion of brain, and who incurred medical and hospital expenses amounting to $3,583.90, was not so insubstantial as to indicate a compromise verdict, and therefore court did not abuse its discretion in granting plaintiff a limited new trial on issue of damages.

5. Automobiles 🔑217(3)

Statute providing that every pedestrian crossing a roadway at any point other than a marked crosswalk or within an unmarked crosswalk at an intersection shall yield right of way to all vehicles on the roadway, does not prohibit a pedestrian from crossing a street outside a crosswalk. Vehicle Code, §§ 85, 562.

6. Automobiles 🔑226(2)

A pedestrian was not guilty of contributory negligence precluding recovery for injuries sustained when struck by automobile, because of alleged fact that she was crossing the street at a place other than unmarked crosswalk, where pedestrian would have been struck by automobile even if she had been within boundaries of unmarked crosswalk. Vehicle Code, §§ 85, 562.

7. Automobiles 🔑160(4)

Alleged presence of pedestrian outside unmarked crosswalk did not relieve driver of automobile of duty to exercise due care for safety of pedestrian. Vehicle Code, §§ 85, 562.

8. Trial 🔑296(3)

Instruction that driver of automobile shall yield to right of way to pedestrian crossing roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, was not error, on ground that instruction implied that there was an unmarked crosswalk and that pedestrian was crossing within it, where defendant's requested instructions defining sidewalk and crosswalk in language of vehicle code had been given. Vehicle Code, §§ 85, 562.

9. Appeal and error ⚿1050(1)

In action by pedestrian for injuries sustained when struck by automobile, against parents of minor driving automobile, on ground that he was on business of his parents at time of accident, admission of driver's license of minor stating that he was granted privilege to operate motor vehicles registered to parent or employer to and from school or work or on business of parent or employer and when accompanied by an adult, was not error, where minor was admittedly not going to or from work at time of accident and was not accompanied by or under supervision of an adult.

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Jones, Thompson & Kelly, Henry F. Walker, Los Angeles, for appellants.

John F. McCarthy, Roy J. Brown, Long Beach, for respondents.

WILSON, Justice.

This action was brought to recover damages for personal injuries suffered by Gertrude Woods who was struck by an automobile driven by defendant Eitze Jr., a minor. His parents are joined as defendants. After trial by a jury a verdict was rendered in favor of plaintiffs for the sum of $5,000 upon which judgment was entered. Plaintiffs moved for a new trial solely upon the issue of damages. Defendants moved for a new trial on all issues. The court granted plaintiffs' motion "on the single issue of measure of damages on grounds of insufficiency of evidence to sustain amount of verdict and upon the inadequacy of the verdict." Defendants' motion for a new trial was denied. Defendants have appealed (1) from the judgment, and (2) from the order granting plaintiffs' motion for a new trial upon the issue of damages.

The accident occurred on December 12, 1947, about 6:00 o'clock P. M., at the intersection of Lakewood Boulevard and Harvey Way in Los Angeles County. It was dark at the time but the weather was clear. Lakewood Boulevard is 90 feet in width and extends northerly and southerly; Harvey Way is 40 feet wide and crosses Lakewood at right angles; Lakewood is divided along the middle by a concrete dividing strip four feet wide; adjoining the curb on the west side of Lakewood Boulevard is an oiled shoulder 20 feet in width; the space between the oiled surface and the center dividing strip is paved with asphaltic concrete divided by a white line into two traffic lanes respectively 11 and 12 feet in width. The concrete dividing strip ends 30 feet south of the south curb line of Harvey Way as extended across Lakewood. The property line on the south side of Harvey is 10 feet south of the south curb line.

The only eye-witnesses to the accident were the two plaintiffs and the defendant driver of the automobile and the evidence is practically without conflict.

Mrs. Woods was on the southeast corner of Lakewood and Harvey Way with her four-year-old child; Mr. Woods was on the southwest corner; Mrs. Woods took the child by the hand and started westerly across Lakewood to her husband; they stopped at or a few feet from the northerly tip of the dividing strip where they waited for a break in south-bound traffic.

Mr. Woods testified he saw defendants' car about 300 feet to the north when his wife and child were on their way across the westerly half of the street; she was struck on or near the line between the oiled shoulder and the westerly south-bound traffic lane; she did not run but took short steps; the last time he saw her before the impact she had stopped.

Mrs. Woods testified that when the north-bound traffic cleared on the easterly half of the highway she crossed to the center of the street where she stopped about two feet north of the northern point of the dividing strip; she waited to let one or two cars pass; there was then no south-bound traffic except defendants' car which was about

300 feet distant when she started from the center of the street to the west side; when she stepped into the lane in which the car was traveling and saw it was not slowing its speed she picked up her child and stepped back onto the asphalt surface; at that time the car was about 200 feet north and approaching the intersection—about even with the north curb line; it was in the oiled portion of the highway; at the time of the impact she was standing in the outer (westerly) lane of the main traveled south-bound portion of the roadway and not on the oiled shoulder; when she stepped into the shoulder the south-bound car was a short distance north of Harvey Way; when she saw the car was not slowing its speed she tried to get out of its way.

A state highway patrolman who arrived at the intersection after the accident testified he found 55 feet of skid, brush and broadside marks which started 21 feet south of the south curb line of Harvey Way as extended across Lakewood and 25 feet east of the west curb line of Lakewood; the marks were on the asphalt roadway; they angled or arched to the left and stopped about 4 feet west of the dividing strip; he talked to defendant driver, who said he had been going south on Lakewood and when he first saw "these people" they were 50 or 60 feet ahead; that they ran out in front of him and he drove to the left trying to avoid them; that he was traveling about 35 miles an hour.

Defendant Eitze Jr., the driver of the car, testified that he was 14 years old; it was customary for him to pick up his sister at Carson and Lakewood, an intersection south of the point of the accident, on her way home from work; he was driving his parents' automobile for that purpose at the time of the accident; his headlights were on low beam; to his knowledge there was no south-bound traffic either in front or to the rear of his car; he was traveling in the middle lane—not on the oiled shoulder—one lane removed from the center dividing barrier; he first saw Mrs. Woods when he was at a point which he marked on the map about 50 feet north of the center line of Harvey Way and 90 to 100 feet north of the point of impact; at that time, said the witness, she was stepping off the north end of the center dividing barrier and was holding a child by the hand; he swerved slightly to the right toward the oiled shoulder intending to pass west of her and "I expected her to stay so I could go around her"; as he swerved he saw in front of his headlights a man [Mr. Woods] standing in the oiled shoulder; he turned left to avoid striking the man and at that time he saw Mrs. Woods crossing the lane "where I had no choice but to hit her and I slammed on my brakes as hard as I could and started skidding"; he first said Mrs. Woods was running and later said "I don't mean that I saw her running at the time * * * but she was in the motion of running, in a leaned forward motion"; his headlights went off her and picked up the man in the road; as he turned back she was still proceeding, then she stopped. He said he was possibly a little over a car length from Mrs. Woods at the time he applied the brakes; the car skidded, broadsided and came to a stop facing in a northeasterly direction.

[1] The jury by its verdict in favor of plaintiffs found that defendant driver was guilty of negligence and Mrs. Woods was not contributorily negligent. By the order denying defendants' motion for a new trial the court agreed with and confirmed the findings of the jury. The court did not err in the ruling.

Defendants do not question the right of the trial court in its discretion to restrict a new trial to a single issue but contend that in this case the court abused its discretion in making the order limiting the new trial to the issue of damages and that such circumscription of the trial will be prejudicial to them. In the case of Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858, on which they rely, it was held that the new trial should not have been limited to the one issue. In that case the evidence was conflicting as to whether the plaintiff was under the influence of intoxicating liquor at the time of the accident, plaintiff received severe injuries and the verdict was for less than the amount the plaintiff had already expended for medical and hospital services and would be required to expend for further surgery. In Shurman v. Fresno Ice Rink, 91 Cal.App.2d 469, 205 P.2d 77, the court held that in view of plaintiff's injuries and the amount of her special damages the trial court was justified in granting a new trial by reason of inadequacy of the verdict, but because of other issues, including a prejudicial error in the rejection of important evidence offered by the defendant, the case should be retried upon all issues.

There is no analogy between the instant case and the cases relied on by defendants. There is no conflict in the evidence, as in the Keogh case—not even as to speed which is usual in such cases; no reversible error occurred as in the Shurman case.

[2, 3] When a jury finds the defendant legally liable for damages but the verdict is for an amount so small in comparison with the expense incurred by the injured person that it is apparent that jurors who believed defendant was not negligent surrendered their opinions in exchange for the consent of other jurors to an award disproportionate to the plaintiff's out of pocket expense—plainly a compromise verdict—a new trial limited to the issue of damages should not be granted. Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 528–529, 67 P.2d 398; Wallace v. Miller, 26 Cal.App.2d 55, 57, 78 P.2d 745. However, the court in its discretion may grant a new trial on that issue alone when the sum awarded is substantial and to a certain extent compensatory though insufficient, but not so trifling in amount that it appears that the jury stultified itself by bargaining grossly inadequate damages for nonexistent liability. Cox v. Tyrone Power Enterprises, Inc., 49 Cal.App.2d 383, 390, 121 P.2d 829; Hughes v. Schwartz, 51 Cal.App.2d 362, 364, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 15, 146 P.2d 34; Tornell v. Munson, 80 Cal.App.2d 123, 126, 181 P.2d 112.

[4] Mrs. Woods was seriously injured, having suffered fractures of several bones, rupture of the liver, concussion of the brain. The verdict was for $5,000. Plaintiff's medical and hospital expenses amounted to $3,583.90, leaving $1,416.10 for general damages. While this amount may be considered substantial the trial judge regarded it as inadequate compensation for Mrs. Woods' injuries. He heard the evidence and was in a position to know that time and money would be uselessly expended in a retrial of the issue of negligence in view of the absence of conflict concerning the facts relating to the accident, taking into account especially defendant driver's testimony as to his manner of driving. The court's discretion was properly exercised in granting the limited new trial.

There were no marked crosswalks at the intersection where the accident took place. Defendants contend that Mrs. Woods was not in an unmarked crosswalk as defined by section 85 [1] of the Vehicle Code, that she should have yielded the right of way to the automobile, sec. 562 [2], and that having failed to do so was guilty of contributory negligence.

[5] Section 562 does not prohibit a pedestrian from crossing a street outside a crosswalk. Genola v. Barnett, 14 Cal.2d 217, 220, 93 P.2d 109; Fuentes v. Ling, 21 Cal.2d 59, 61, 130 P.2d 121. In the latter case the court held that the question of plaintiff's contributory negligence is for the trial court to determine and its find-

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[1] Sec. 85. "'Crosswalk' is either:

"(a) That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street.

"(b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."

[2] Sec. 562. "(a) [Yielding of right of way to vehicles.] Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) [Duty of driver to exercise care.] The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

ings when supported by the evidence will not be disturbed on appeal. Although the duty of a pedestrian, while crossing a street other than in a regular crosswalk, to yield the right of way may call for a higher degree of care upon his part than would be applied to one crossing at a regular crosswalk, yet the question as to whether such care was exercised is one for the jury, unless he is so careless that it can be said that he was negligent as a matter of law. Brannock v. Bromley, 30 Cal.App.2d 516, 524, 86 P.2d 1062. Where a pedestrian plaintiff estimated that a car was 200 or 300 feet distant when he stepped into the street the contention made by the defendant driver that the plaintiff was guilty of contributory negligence as a matter of law is without merit. Lang v. Barry, 71 Cal. App.2d 121, 124, 161 P.2d 949.

[6] In Nicholas v. Leslie, 7 Cal.App. 2d 590, 46 P.2d 761, it is held that the rights and duties of the parties are the same, whether the plaintiff is just within or just without the boundaries of the crosswalk and that if the plaintiff had been within the boundaries of the crosswalk she would have been struck just the same because the defendant did not see her until it was too late to avoid striking her. The situation is similar in the instant case. Defendant Eitze Jr. saw Mrs. Woods when he was approximately 100 feet distant from her; he did not slacken the speed of his car but depended on his ability to pass her by swerving to his right. Had Mrs. Woods been within the extended boundary lines of the sidewalk on Harvey Way she would have been struck since defendant driver did not apply his brakes until an instant before the collision—slightly more than a car length from her.

[7] Furthermore, Mrs. Woods' presence outside the unmarked crosswalk, if she were outside, did not relieve the driver of the duty to exercise due care for her safety. Sec. 562(b) quoted in the footnote.

[8] Defendants assign as error the giving of the following instruction: "(a) Yielding of right-of-way to pedestrian. The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection." They contend that this and other instructions were calculated to leave the impression that there was an unmarked crosswalk and that Mrs. Woods was crossing within it. Preceding the foregoing instruction the court gave an instruction requested by defendants defining "highway," "roadway," "sidewalk" and "crosswalk" in the language of the Vehicle Code and following it the court instructed the jury, also at the request of defendants, quoting verbatim section 562 of the Vehicle Code. There is no error in the instruction complained of since (1) it did not intimate that Mrs. Woods was within the crosswalk, and (2) defendants themselves requested instructions with reference to crosswalks which were given by the court.

[9] Defendants assign as error the admission in evidence of the driver's license issued to defendant Eitze Jr., which contained the following language: "Privilege is hereby granted to operate motor vehicles registered to parent or employer to and from school or work or on business of parent or employer and otherwise when accompanied by and under immediate supervision of an adult, and subject to other restrictions hereon."

The complaint alleges that the driver was the agent of his codefendants and acting within the scope of his agency at the time of the accident. This allegation is denied by the answer. The agency of Eitze, Jr. for his parents having been placed in issue by the pleadings, the license was properly admitted in evidence in proof of the allegation. It authorized Eitze, Jr. to operate motor vehicles registered to his parent (1) to and from school or work, (2) on business of parent or employer, and (3) when accompanied by and under immediate supervision of an adult. He was not going to or from school or work, and he was not accompanied by or under the supervision of an adult. By reason of his license the only other condition under which he could lawfully drive alone was on business of his parents. If not so acting he was driving unlawfully. The license, therefore, was admissible for the purpose of proving his agency which defendants had denied.

The judgment is affirmed except as to the single issue of damages upon which a new trial was granted. The order granting a new trial upon that issue alone is affirmed.

MOORE, P. J., and McCOMB, J., concur.

95 Cal.App.2d 44

In re BOYD'S ESTATE.

BOYD et al. v. MUDD et al.

Civ. 16995.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1949.

Rehearing Denied Jan. 3, 1950.

Hearing Denied Feb. 8, 1950.

Proceeding in the matter of the estate of Lynn C. Boyd, deceased, wherein Mahala M. Boyd, widow of deceased, petitioned for a decree determining her interest in the estate. Martha B. White was administratrix cum testamento annexo, and Jane B. Mudd and Helen D. Boyd filed objections.

The Superior Court of Los Angeles County, Raymond McIntosh, J., rendered a decree adverse to petitioner and petitioner appealed.

The District Court of Appeal, McComb, J., reversed the decree, holding that petitioner, as widow, did not elect to abide by will and waive right to claim that the property of testator was community property.

1. Wills ⚷782(1)

A widow's obligation to make an election arises only when the testator, by will, clearly manifests an intention to make a testamentary gift to widow stand in lieu of her community interest in the estate property.

2. Wills ⚷792(1)

Where will did not manifest an intention to require testator's widow to make an election between her rights under statute and rights widow might receive under the will, widow by applying for and accepting a family allowance from the estate did not elect to abide by will and waive right to claim that the property of testator was community property.

Rodney F. Williams, Los Angeles, for appellant.

Martin & Bowker, Tujunga, for administratrix.

Bailey & Poe, Rufus Bailey, Los Angeles, for respondent Jane B. Mudd.

McCOMB, Justice.

This is an appeal from an order of the Probate Court determining interest in an estate adversely to the claims of appellant.

Facts: Decedent Lynn C. Boyd and appellant were married in Indiana in 1894. During the time they were domiciled outside the state of California decedent acquired personal property which in the state where acquired would have been his separate property, but which if decedent and appellant had been residents of California would have been community property of the parties. In 1944 appellant and her husband moved to California and became residents of this state and were such at the time of decedent's death May 13, 1945. Appellant's husband left a will by which it was provided: "All the rest and residue of my property, real, personal or mixed, of every kind and description whatsoever and whereever the same may be located or situate, of which I may die seized or possessed, or to which I may be entitled at the date of my death, I give, devise and bequeath to my son, James F. Boyd, as Trustee, to be held in trust and for the following uses and purposes, to wit: * * *."

The terms of the trust provided that the trustee pay to appellant the income from the trust and so much of the principal as she might deem necessary for her convenience, welfare, care and support, and that upon appellant's death the trust property should be distributed share and share alike to the children of their marriage. Decedent's will was admitted to probate and on January 8, 1946, pursuant to appellant's petition, an order for family allowance was made authorizing payment to her of $250.00 per month from the funds of the estate. On October 28, 1946, a further order was made by the probate court upon application of appellant increasing the family allowance to her in the sum of $500.00 per month. On December 26, 1946, appellant filed a petition for a decree to determine her interest in the estate, alleging that all assets of the estate were community property of decedent and appellant and by reason thereof she was entitled to have distributed to her one half of the estate as community property, and to have the other half of the estate which was subject to her husband's testamentary disposition placed in the testamentary trust provided for in the will.

Objections to the petition to determine interest were filed by respondent Jane B. Mudd, who claimed that the assets of the estate were separate property of decedent, and that petitioner had made an election. After a hearing the court sitting in probate held that appellant by petitioning for and accepting a family allowance had elected to abide by the terms of the will and was precluded from claiming any interest in the estate by reason of such election other than her interest as set forth in the will.

Question: Did appellant by applying for and accepting a family allowance from the estate thereby elect to abide by the terms of the will and waive any right to claim that the property of decedent was community property?

[1] This question must be answered in the negative. A widow's obligation to make an election arises only where the testator, by the terms of his will, clearly manifests an intention to make a testamentary gift to her stand in lieu of her community interest in the property of the estate. (Estate of Prager, 166 Cal. 450, 454, 137 P. 37; Estate of Silvey, 42 Cal. 210, 213; In re Gilmore's Estate, 81 Cal. 240, 242 et seq., 22 P. 655. See also Estate of Wickersham, 138 Cal. 355, 363, 70 P. 1076, 71 P. 437.)

[2] In the instant case there is nothing inconsistent between appellant's accepting a family allowance and the provisions in the will for her benefit. The provisions in the will were general in their nature, and decedent, by the terms of his will, did not manifest an intention to require her to make an election between her rights under the statute and those which she might receive under the will. Therefore she was not required to make, and her action did not constitute, an election.

The decree determining interest in the estate is reversed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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94 Cal.App.2d 919

In re BARTON'S ESTATE.

HARRIS v. SHAW et al.

Civ. 7647.

District Court of Appeal, Third District, California.

Dec. 5, 1949.

Proceeding by Laura Lavon Harris against Ruby I. Shaw, and others, in the matter of the estate of Sara E. Barton, to determine heirship.

The Superior Court of Sacramento County, Peter J. Shields, J., entered judgment that petitioner was not entitled to inherit any part of the estate of her deceased legitimate half-sister and petitioner appealed.

The District Court of Appeal, Third Appellate District, Peek, J., reversed the judgment, holding that an illegitimate child who had been legitimated by her father was entitled to inherit the whole estate of her deceased legitimate half-sister though her parents never married.

1. Bastards ⚿10

A child who is deemed for all purposes legitimate cannot be regarded as still illegitimate for some purposes. Civ.Code, § 230.

2. Bastards ⚿105

Illegitimate daughter legitimated by father, though her parents never married, was entitled under statute to inherit the whole estate of her deceased legitimate half-sister to exclusion of deceased's first cousin. Civ.Code, § 230; Probate Code, § 255.

◆

J. J. Henderson and Donald Wachhorst, Sacramento, for appellant.

Ralph H. Lewis, Sacramento, White & Harber, Sacramento, John Q. Brown, Dist. Atty., Sacramento, for respondents.

PEEK, Justice.

This is an appeal by petitioner from a judgment precluding her from participating as an heir in the distribution of the estate of Sara E. Barton, deceased.

By her petition to determine heirship, it was alleged that decedent died intestate; that petitioner was the illegitimate daughter of decedent's father who had legitimated her by compliance with the requirements of section 230 of the Civil Code; that she was therefore the half-sister of decedent and as such was the sole heir at law of said decedent entitled to the distribution of the whole of decedent's estate.

The trial court found the foregoing allegations to be true and in addition found that petitioner's parents did not intermarry and concluded therefrom that under the provisions of section 255 of the Probate Code the petitioner was not entitled to inherit any part of said estate.

The sole question presented for determination on this appeal is whether appellant, as an illegitimate child who has been legitimated by her father under the provisions of section 230 of the Civil Code is entitled to inherit the whole of the estate of her deceased legitimate half-sister to the exclusion of respondents who are the first cousins of decedent.

It is appellant's contention, as it was in the probate court, that since she was legitimated in accordance with section 230 of the Civil Code which provides in part that "such child is thereupon deemed for all purposes legitimate from the time of its birth", she is entitled to inherit as decedent's half-sister. In opposition to such contention respondents argue that as the parents of appellant never married she cannot, under the provisions of section 255 of the Probate Code, inherit any part of decedent's estate.

[1, 2] At the time this appeal was argued the case of Estate of Garcia, 34 Cal. 2d 419, 210 P.2d 841, was pending in the Supreme Court, and as the precise question here in issue was likewise the sole issue in that case, the present appeal was submitted pending the filing of the opinion in the Garcia case. Obviously therefore the opinion of the Supreme Court therein is decisive of this proceeding, and because of the similarity of the two cases a dissertation by this court upon the question involved would be nothing more than a restatement of the rule therein enunciated, and hence would be wholly superfluous. Suffice it to say that the Garcia case has now laid down the rule in this state that a "child who is 'deemed for all purposes legitimate' [section 230 Civil Code] cannot be regarded as still illegitimate for some purposes, and a child who has become legitimate can no longer be regarded as an "illegitimate child.'" (34 Cal.2d 421, 210 P.2d 841, 842.) Thus the restrictive language of section 255 of the Probate Code has no application to appellant herein who was legitimated by her father in accordance with the provisions of said section 230 of the Civil Code.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

94 Cal.App.2d 945

BOUTWELL v. STATE BOARD OF EQUALIZATION et al.

STATE BOARD OF EQUALIZATION v. STATE PERSONNEL BOARD et al.

Civ. 14097.

District Court of Appeal, First District, Division 2, California.

Dec. 6, 1949.

Petition by Delbert W. Boutwell for a writ of mandate against State Board of Equalization and others to compel petitioner's restoration as a liquor control officer in accordance with finding of State Personnel Board.

The Superior Court for the City and County of San Francisco, Edward P. Murphy, J., entered judgment that the peremptory writ should issue, and State Board of Equalization appealed opposed, by Delbert W. Boutwell, real party in interest.

The District Court of Appeal, Dooling, J., reversed the judgment, holding that evidence was sufficient to support the Board of Equalization's dismissal of petitioner for failing to demonstrate efficiency in his work.

1. Officers ⚷11.5

Object of probationary period is to supplement work of Civil Service Examiners in passing on qualifications and eligibility of probationers, and if in opinion of appointive power, probationer is not fitted to discharge duties of the position, he may be discharged by summary method under Civil Service Act before he acquires permanent civil service status.

2. Officers ⚷11.5

Employer under whose direction liquor control officer is working has the power to exercise discretion and personal judgment in determining whether probationary employee shall acquire permanent status.

3. Officers ⚷11.5

Where Personnel Board certified respondent to State Board of Equalization for probationary appointment as liquor control officer, and within the probationary period the respondent was given notice of his rejection because of inefficiency and such determination was supported by the evidence, the Personnel Board was without power to reweigh the evidence, draw other conclusions and order the probationer restored to his position. Government Code, §§ 19173, 19175.

4. Officers ⚷11.5

Where probationary liquor control officer failed to serve members of public visiting Board office, failed to make reports of hearing involving two minors in custody in connection with violation of Alcoholic Beverages Act, and failed to properly carry out undercover work, evidence was sufficient to support Board of Equalization's rejection of officer for failing to demonstrate efficiency in his work. Government Code, §§ 19173, 19175.

5. Constitutional law ⚷102(1)

Respondent who received a probationary appointment to the position of liquor control officer had no vested right in public employment other than that given by the statute, and where the statute was strictly followed in his rejection within the probationary period by the State Board of Equalization he had no cause for complaint. Government Code, §§ 19173, 19175.

◆

Fred N. Howser, Attorney General, J. Albert Hutchinson, Deputy Attorney General, for State Board of Equalization and others, appellants.

Bion R. Gregory, Sacramento, for State Personnel Board, respondent.

Harold C. Brown, Malcolm N. McCarthy, San Francisco, for Delbert W. Boutwell, respondent.

DOOLING, Justice.

On June 16, 1947 the State Personnel Board certified respondent Boutwell to the State Board of Equalization for probationary appointment to the position of liquor control officer and Boutwell received such appointment. On November 18, 1947 (admittedly within the probationary period) Boutwell was given written notice by appellant of his rejection from his position "because you have failed to demonstrate efficiency in your work" and a notice in writing of this action and the reason therefor was filed with the Personnel Board.

Boutwell appealed from the action of the Board of Equalization to the Personnel Board and after a hearing the Personnel Board found that in the rejection of Boutwell "Section 19173 of the Government Code has not been complied with" and ordered Boutwell restored to his position. The Board of Equalization refused to obey this order, Boutwell filed this action for writ of mandate to compel his restoration and the court after a trial entered judgment that the peremptory writ should issue as prayed. From that judgment this appeal is taken.

The case turns upon the proper construction of sections 19173 and 19175, Government Code. Those sections at that time read:

"Sec. 19173. Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility.

"Notice of rejection accompanied by a statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection."

"Sec. 19175. After investigation of the reasons for rejection of a probationer, the board may:

"(a) Restore him to the eligible list for certification to any position within the class other than the position from which he was rejected; or

"(b) If it is determined that Section 19173 has not been complied with, restore him to the position from which he was rejected."

There is no question that in rejecting Boutwell the Board of Equalization followed literally the steps required by sec. 19173 and specified a reason for its action falling within that section; and the trial court so found. There is likewise no question that the conduct of Boutwell in the position from which he was rejected, which conduct was the basis of the determination of the Board of Equalization that he had failed to demonstrate efficiency in his work, was within the knowledge of the board through the persons in charge of Boutwell, and that they truthfully relied on that conduct in rejecting Boutwell; and the court so found. The basis of the finding of the Personnel Board that in the action of the Board of Equalization section 19173 of the Government Code was not complied with was a reweighing of the facts upon which the Board of Equalization acted and a determination that those facts did not support the conclusion of the Board of Equalization that Boutwell had failed to demonstrate efficiency in his work.

A part of the conduct of Boutwell from which the Board of Equalization drew its conclusion that he failed to demonstrate efficiency may be briefly summarized: 1. While on duty in a public office on several occasions Boutwell read a copy of a weekly publication and while he was so engaged members of the public visited the office and Boutwell was so absorbed in his reading that he failed to serve such members of the public. 2. On one occasion the county probation officer called Boutwell and informed him that two minors were in custody in connection with a violation of the Alcoholic Beverages Act and that the circumstances indicated violations of the law by holders of liquor licenses and Boutwell at the request of the probation officer appeared at a police court hearing involving this matter. Reports of such matters are required to be made to the Board of Equalization but Boutwell made no report of these activities. 3. Some of the work of liquor control officers is so-called "undercover work" in which the probability of discovering violations of the Alcoholic Beverages Act depends upon the identity of the enforcement officers being unknown to the suspected violators. Boutwell after having been warned not to disclose the fact that he was a liquor control officer was sent to a tavern under suspicion where he met two other liquor control officers. Instead of concealing their positions as instructed Boutwell, although the other officers did not speak to him or give any sign of recognition, addressed them about other enforcement activities in the hearing of several people thereby disclosing that all three were liquor enforcement officers and destroying the possibility of any of the three performing any undercover work in that tavern or its vicinity.

Enough has been stated to demonstrate that the facts were sufficient to support his employer's conclusion that Boutwell had failed to demonstrate efficiency in his work. This question is thus squarely presented: Where the facts known to the appointing power are sufficient to support the conclusion that the probationer has not demonstrated efficiency and the appointing power draws that conclusion and rejects him on that ground, has the Personnel Board under Government Code sec. 19175 (b) the power to reweigh the evidence, draw the other conclusion and order the probationer restored to his position?

If this power exists it is to be found in the following language of sec. 19175(b): "If it is determined that section 19173 has not been complied with (the Personnel Board may) restore him to the position * * *."

[1] To read the power of determining whether section 19173 has been complied with as including the power to reweigh the evidence and reach a conclusion contrary to a reasonably tenable one drawn by the appointing power from the same facts would make it run counter to the prior understanding of the courts as to the purpose of probationary appointments under civil service. This purpose was never more clearly stated in a few words than by our Supreme Court in Wiles v. State Personnel Board, 19 Cal.2d 344, 347, 121 P.2d 673, 674:

"The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status. See Neuwald v. Brock, 12 Cal.2d 662, 670, 86 P.2d 1047; Note, 131 A.L.R. 383."

[2] In making the determination whether the probationer has exhibited during his probation the proper qualifications to become a permanent civil service employee the employer under whose direction and observation he is working is in the best position to form a conclusion. As said by the court in Broyles v. State Personnel Board, 42 Cal.App.2d 303, 307, 108 P.2d 714, 716: "The appointing power must necessarily be allowed to exercise discretion and personal judgment in determining whether a probationary employee shall acquire permanent status."

[3] We are satisfied that, if the legislature had intended to work such a radical departure from existing theory and practice as to take from the appointing power the determination of whether the probationer's conduct in his employment showed "a failure to demonstrate merit, efficiency, fitness, and moral responsibility", sec. 19173, Gov.Code, where that conduct was sufficient to support the appointing power's conclusion, and to transfer that power to the Personnel Board, it would have used clearer language for that purpose than that found in sec. 19175.

[4] The section has since been amended, Stats.1949, p. 1072, to give the Personnel Board the power to restore the probationer "if the board determines, after hearing, that there is no substantial evidence to support the reason or reasons for rejection." Whether this amendment enlarged the previous powers of the board, People v. Valentine, 28 Cal.2d 121, 142, 169 P.2d 1, or only clarified the meaning of the previous provision, Metropolitan Water Dist. v. Toll, 1 Cal.2d 421, 427-428, 35 P.2d 519, we need not pause to inquire. There was substantial evidence

in this case to support the Board of Equalization's reason for rejecting Boutwell and we are satisfied that it complied with section 19173 within the meaning of 19175(b) as it then read and that the Personnel Board's conclusion to the contrary was erroneous and beyond its powers.

[5] The suggestion is made that if the Personnel Board had no power to reweigh the evidence the superior court must have that power under the doctrine of Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, and the cases which have followed it. Due process of law, stressed in those cases, is not here involved. Boutwell's rights are purely statutory, he has no vested right in public employment other than that given by the statute, and the statute was strictly followed in his rejection. 21 Cal.Jur., Public Officers, sec. 4, pp. 821-822; Matter of Carter, 141 Cal. 316, 74 P. 997; Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713; Nider v. City Commission, 36 Cal.App. 2d 14, 30, 97 P.2d 293; Butterworth v. Boyd, 12 Cal. 2d 140, 150, 82 P.2d 434, 126 A.L.R. 838.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.

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94 Cal.App.2d 798

REIMER et al. v. FIRPO et al.

Civ. 14183.

District Court of Appeal, First District,
Division 1, California.
Nov. 25, 1949.

Louise A. Reimer and another brought action against Theresa Firpo and others. The Superior Court in and for the City and County of San Francisco, Maurice T. Dooling, Jr., entered a minute order directing that judgment be entered against certain of the defendants, but findings of fact and conclusions of law were never signed or filed, and a formal judgment was never entered. Subsequently, Maurice T. Dooling, Jr., became a justice of the District Court of Appeal.

The Superior Court in and for the City and County of San Francisco, Melvin I. Cronin, J., granted plaintiffs a new trial, and Theresa Firpo and another appealed.

The District Court of Appeal, Peters, P. J., sustained plaintiffs' motion to dismiss the appeal, holding that the order in effect granted a mistrial rather than a new trial, and that therefore the order was not appealable.

1. Appeal and error 🔑110

An order granting a new trial is appealable.

2. Judges 🔑31

Where superior court judge entered a minute order directing that judgment be entered for plaintiffs, but findings of fact and conclusions of law were never signed or filed, and a formal judgment was never entered before time when judge became a justice of District Court of Appeal, he had no power to complete the incompleted trial.

3. Judges 🔑31

On expiration of the term of office of a judge, his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished.

4. Judges 🔑24, 32

Where superior court judge entered a minute order directing that judgment be entered for plaintiffs, but findings of fact and conclusions of law were never signed or filed, and a formal judgment was never entered before time when judge became a justice of District Court of Appeal, neither any associate of his on the bench of the superior court nor a successor judge had legal power to complete the incomplete trial by signing the findings.

5. Judges 🔑24, 32
Trial 🔑387(1)

A litigant is entitled to a decision on the facts from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury, and he cannot be compelled to accept a decision on the facts from another judge or jury.

6. New trial 🔑**116(1)**

Where findings have not been signed or filed, motion for a new trial is premature. Code Civ.Proc. § 656.

7. Judges 🔑**32**
Trial 🔑**404(5)**

The successor of a trial judge has no authority to decide or make findings of fact in a case not tried by him, and where, in such a case, material issues are not passed on and disposed of on the trial of the cause, it is deemed a "mistrial," and another trial must be had.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistrial".

8. Appeal and error 🔑**110, 870(6), 933(1)**

Where superior court judge entered a minute order directing that judgment be entered for plaintiffs, but findings of fact and conclusions of law were never signed or filed, and a formal judgment was never entered before time when judge became a justice of District Court of Appeal, order of successor judge purporting to grant a new trial would be interpreted as granting a mistrial and a trial of the cause, because a motion for new trial was premature, and therefore such order was non-appealable and could only be reviewed on appeal from judgment. Code Civ.Proc. § 656.

◆

Abraham Setzer, Philander Brooks Beadle, San Francisco, for plaintiffs and respondents.

Walter H. Duane, Joseph P. Lacey, San Francisco, for defendants and appellants.

PETERS, Presiding Justice.

This is a motion to dismiss an appeal. In January, 1937, Louise A. Reimer and her husband, Martin Reimer, brought an action against various named defendants. The case was tried over a period of several days in November, 1938, without a jury, before Hon. Maurice T. Dooling, Jr., then the duly qualified Superior Court judge for San Benito County who had been duly assigned by the Judicial Council to sit as a judge of the Superior Court of San Francisco. On November 23, 1938, a minute order was entered directing that judgment be entered in favor of Theresa Firpo and Bayern Bund, two of the defendants, "and submitted as to all other defendants." On March 14, 1939, a minute order was entered directing "that judgment be entered in favor of the plaintiffs in the sum of $2500.00" against the remaining defendants, Peter Firpo, Benno Pinole and Garibaldi. Findings of fact and conclusions of law were never signed or filed, and a formal judgment has never been entered. In 1945, Judge Dooling became, and ever since has been, a justice of the District Court of Appeal, First Appellate District, Division Two.

In January, 1949, plaintiff, Louise A. Reimer, moved the trial court for an "order setting aside submission of cause and order for entry of judgment and granting movant a new trial, as to defendants Peter Firpo, Benno Pinole and G. Garibaldi," on the ground that such relief would be in the interests of justice in that Judge Dooling is no longer a member of the Superior Court and is unable to enter a proper judgment. Under date of February 4, 1949, the presently acting presiding judge of the San Francisco Superior Court entered his order:

1. Granting the motion as prayed;
2. Vacating the order of submission of November 23, 1938;
3. Vacating and setting aside the order of March 14, 1939, directing entry of judgment; and stating that
4. "The above entitled cause is enlarged for a new trial as to the Plaintiff Louise A. Reimer and Defendants Peter Firpo, Benno Pinole and G. Garibaldi."

From this order Firpo and Garibaldi have appealed. After the filing of the appellants' opening brief, Louise A. Reimer filed the present motion to dismiss the appeal, on the ground that the order appealed from is nonappealable.

[1] If the questioned order is one granting a new trial, in the legal sense, said order is, of course, appealable, whether correctly or incorrectly granted. But that is not the precise nature of the order. It is quite clear that, when a case requiring findings is tried, the trial is not complete but is still in process of determination until findings are signed and filed. Until that time, the trier of the fact may change his mind, and, even though an order has been made directing the entry of judgment, may order a different judgment to be entered.

[2, 3] It is equally clear that when Judge Dooling became a member of the appellate court, his term as Superior Court judge terminated, and that thereafter he had no power, except where specifically permitted to do so by statute, to perform any judicial act as a trial judge, and certainly had no power to complete an incompleted trial. This rule, supported by several cases, is stated as follows in 14 Cal.Jur. p. 801, § 12, at p. 803: "Upon the expiration of the term of office of a judge his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished."

[4, 5] It is equally clear that no successor of Judge Dooling on the trial bench, and no associate of his on that bench, had the legal power to complete the incomplete trial by signing the findings. In Guardianship of Sullivan, 143 Cal. 462, at page 467, 77 P. 153, at page 155, the court stated the proper rule as follows: "A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another judge or another jury." This is in accord with the general rule on this subject. See annotation on this subject in 54 A.L.R. 952, particularly at page 959.

[6] Thus, in the instant case there never was a complete trial or decision in the case. A "new trial" can only be granted "after a trial and decision by a jury, court or referee." § 656, Code Civ.Proc. That means that since findings were never signed or filed, the motion for a new trial prior thereto was premature. Hughes v. DeMund, 70 Cal.App. 265, 233 P. 93; Young v. Briggs, 17 Cal.App.2d 338, 61 P.2d 1223.

[7, 8] These principles must be kept in mind in interpreting the order of February 4, 1949. Certainly, we will not presume that the trial court intended to grant a "new trial" in a case where no power to grant the motion existed. The trial having been incomplete, the trial court's power was limited to declaring a mistrial and resetting the cause for trial. In the annotation in 54 A.L.R. 952, at page 959, the proper rule, supported by several cases, is set forth as follows: "The successor of a trial judge has no authority to decide or make findings of fact in a case not tried by him; and where, in such a case, material issues are not passed on and disposed of on the trial of the cause, it is deemed a mistrial, and another trial must be had." Although one portion of the challenged order purported to grant a "new trial" to plaintiff, it is obvious that, when that order is interpreted, in accordance with the above principles, what was intended was to grant a mistrial and to order a trial of the cause. Such an order is, of course, nonappealable and can only be reviewed on appeal from the judgment. For that reason, at this time we cannot, and do not, pass upon the question of the legal effect of the long delay by plaintiffs in bringing their cause to trial. That is a problem that can only be reviewed on appeal from the judgment, if one be entered.

The order appealed from being nonappealable, the appeal therefrom is dismissed.

WARD and BRAY, JJ., concur.

95 Cal.App.2d 17

BLODGETT et al. v. HADDOCK et al.

Civ. 17122.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1949.

Action by Georgia C. Blodgett and others against Frank D. Haddock and others for partition of realty constituting corpus of testamentary trust after death of life beneficiary.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered an order appointing a receiver, and named defendant appealed.

The District Court of Appeal, Moore, P. J., held that action in partition was appropriate to reach deceased life beneficiary's surviving husband as adverse claimant in possession, and that, since he had no assets from which a judgment could be satisfied, a receiver was properly appointed to collect and conserve rents pending final disposition of the realty, and affirmed the order.

1. Partition ⚷12(5), 53

Where husband of life beneficiary after her death continued to occupy and collect rents from realty constituting corpus of testamentary trust, asserting an adverse interest in the realty, action in partition at instance of remaindermen was appropriate to reach him as adverse claimant in possession, and where he had no assets or other income from which a judgment could be satisfied a receiver was properly appointed to conserve the corpus and income of trust property pending outcome of trial and final disposition of the property. Code Civ.Proc. §§ 564, 753.

2. Partition ⚷74

The rights of adverse occupants of land which is the subject of an action in partition may be tried and determined in such action. Code Civ.Proc. § 753.

3. Partition ⚷53

Superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of realty among tenants in common and should do so when the circumstances require it. Code Civ.Proc. § 564.

4. Partition ⚷65

An action for partition of realty among tenants in common is an action in equity, and court has jurisdiction to hear and determine all the issues in order to do complete justice by deciding the whole case.

5. Wills ⚷687(2)

Where testator bequeathed one-eleventh of residuary estate in trust for named daughter so long as she lived and provided that at her death trust fund should be equally divided among remaining children of testator or issue of deceased children, the fee in realty constituting corpus of trust vested in testator's other children at death of life beneficiary and her surviving husband had no interest therein.

6. Partition ⚷82

Pending ultimate disposition of action in equity for partition of realty constituting corpus of testamentary trust, the corpus and its income must be so conserved by the court as to enable the rightful owners to come into their own.

7. Partition ⚷53

Appointment of a receiver in action for partition of realty among tenants in common rests largely in the discretion of trial court. Code Civ.Proc. § 564.

◆

Maury, Harrington & Houck, Los Angeles, and Ray L. Mayfield, South Gate, by George R. Maury, Los Angeles, for appellant.

James S. Jarrott and Wm. Ray Schirmer, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether an order appointing a receiver for the corpus of a testamentary trust estate which has reverted to the heirs of the testator upon the death of the sole beneficiary is valid.

In his lifetime Francis R. Fencil bequeathed ten-elevenths of the residue of his estate to ten designated children. The remaining one-eleventh he bequeathed in trust to his executors as trustees for his "daughter, Anna M. Haddock, so long as she lives. At her death, the said trust fund * * * shall be equally divided among my remaining children or the issue of deceased children." Pursuant to said bequest the trustees with the consent of Anna about August 1, 1940, acquired lot 309, tract 3477, Los Angeles county, made improvements thereon for which they used $7,000 which constituted the one-eleventh of the residue. After the decease of Anna, October 2, 1945, her surviving husband, Frank D. Haddock, occupied one of the dwelling units on lot 309 and collected rentals from the three tenants in possession of the other three units, aggregating $160 per month. Frank is without means or assets to pay any judgment for rentals; has no income other than from the trust property. So finding, the trial court made the order appointing a receiver, from which comes this appeal.

[1–4] There is no error in the order appointing the receiver or in the proceedings therefor. While such appointment is not proper in an ejectment or other strictly legal action the rights of adverse occupants of land which is the subject of an action in partition may be tried and determined in such action. Middlecoff v. Cronise, 155 Cal. 185, 191, 100 P. 232, 17 Ann.Cas. 1159; Adams v. Hopkins, 144 Cal. 19, 29, 77 P. 712. The superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property among tenants in common and should do so when the circumstances require it. Lent v. H. C. Morris Company, 25 Cal.App.2d 305, 307, 77 P.2d 301. Such an action being one in equity, the court had jurisdiction to hear and determine all the issues in order to do complete justice by deciding the whole case. Hendrickson v. Bertelson, 1 Cal.2d 430, 434, 35 P.2d 318.

[5] The court below found that appellant occupies real property whose title reverted to his codefendants and to the respondents upon the decease of Anna Haddock. Having acquired only a life estate in the property, Anna had no interest to pass on to her husband at her death. On the contrary, the fee in the property vested in Francis R. Fencil's other progeny upon Anna's decease. Although appellant had invested no capital in the lot or its improvements and had acquired no interest by prescription yet he had asserted an adversary interest in the property some four months prior to the commencement of this action. As such adverse claimant an action in partition was appropriate to reach him as one in possession. Code Civ.Proc., sec. 753. Since he was without assets or income from which a judgment could have been satisfied and had no divine guaranty for avoiding death or protracted illness, how could the heirs and devisees of the testator have been made secure against loss otherwise than by the appointment of a receiver to collect and conserve the revenues earned by the properties pending the outcome of a trial?

[6, 7] Such is the remedy prescribed by statute, Code Civ.Proc., sec. 564, and long in use in actions for partition as acknowledged by appellant. His thesis is that in the present action he was a defendant in possession and the purpose of the lawsuit was to eject him; that an action to eject is one for possession and is legal, not equitable, citing Miller v. Oliver, 174 Cal. 407, 163 P. 355; Scott v. Sierra Lumber Company, 67 Cal. 71, 7 P. 131; Bateman v. Superior Court, 54 Cal. 285. Not one of his cited cases involved a partition. All were actions at law; hence the motion in each for the appointment of a receiver was necessarily denied. It is otherwise in actions in equity. Pending the ultimate disposition the corpus and its income must be so conserved by the court as to enable the rightful owners to come into their own. Mines v. Superior Court, 216 Cal. 776, 778, 16 P.2d 732. Such appointment rests largely in the discretion of the trial court. Goes v. Perry, 18 Cal.2d 373, 381, 115 P.2d 441.

Order affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 895

CONSOLIDATED MORTGAGE CO. v. ROBERTS.

Civ. 3892.

District Court of Appeal, Fourth District, California.

Dec. 1, 1949.

Hearing Denied Jan. 26, 1950.

The Consolidated Mortgage Company brought an unlawful detainer action against E. W. Roberts.

From an order of the Superior Court of Orange County, Robert Gardner, J., setting aside a default judgment, plaintiff appealed.

The District Court of Appeal, Mussell, J., affirmed the order, holding that the record did not clearly show abuse of the superior court's discretion.

1. Appeal and error 🔑957(1)
Judgment 🔑139

An application under statute to set aside default judgment is addressed to trial court's sound discretion, and his ruling will not be interfered with by appellate tribunal, in absence of clear showing of abuse of discretion. Code Civ.Proc. § 473.

2. Judgment 🔑135, 139

Trial courts' power to set aside default judgment should be freely and liberally exercised to end that cases shall be disposed of according to their substantial merits, rather than on mere technical matters of procedure, and proper decisions rest almost entirely in such courts' discretion. Code Civ.Proc. § 473.

3. Appeal and error 🔑957(1)

An appellate court will interfere with trial court's ruling, refusing or granting order setting aside default judgment, only in extreme cases. Code Civ.Proc. § 473.

4. Judgment 🔑135

Any doubt as to whether default judgment should be set aside should be resolved in favor of application for such relief to end of securing trial on merits. Code Civ. Proc. § 473.

5. Appeal and error 🔑957(2)

The record on appeal from order setting aside default judgment on grounds of mistake, inadvertence, surprise and excusable neglect, inadequate publication of summons, and insufficiency of affidavit to support order for publication, did not clearly show abuse of superior court's discretion, as required to authorize reversal by appellate court. Code Civ.Proc. § 473.

6. Forcible entry and detainer 🔑19(2)
Process 🔑106

Ordinarily, publication of summons against defendant residing outside, or absent from, state must not be less than for two months, but publication thereof in summary proceedings to obtain possession of realty must be for reasonable time. Code Civ.Proc. § 413.

7. Judgment 🔑145(4)

Defendant's and his attorney's affidavits, supporting motion to set aside default judgment in unlawful detainer action, and proposed answer pleading equitable defense, made sufficient prima facie showing of meritorious defense to action. Code Civ.Proc. § 473.

8. Judgment 🔑145(4)

The statement of facts, showing meritorious defense to action, in affidavits supporting motion to set aside default judgment and defendant's proposed answer, need only embody ultimate facts. Code Civ.Proc. § 473.

◆

Henry S. Dottenheim, Beverly Hills, for appellant.

Bodkin, Breslin & Luddy, Los Angeles, for respondent.

MUSSELL, Justice.

On November 1, 1948, in this action for unlawful detainer, plaintiff obtained a default judgment by publication of summons and on the same date a writ of restitution was served on defendant, pursuant to which all of the stock in trade and fixtures were removed from defendant's place of business at Laguna Beach.

Defendant moved to set aside the judgment under the provisions of Section 473 of the Code of Civil Procedure on the grounds that the judgment was taken against him through mistake, inadvertence, surprise and excusable neglect; that the judgment was based upon inadequate publication of the summons and that the order for publication was not sufficiently supported by affidavit. The motion was heard upon affidavits, the pleadings and records in the action and a minute order was entered setting aside the default, granting the motion to strike and allowing the plaintiff ten days to amend. Plaintiff appeals from the minute order.

Plaintiff and defendant entered into a written agreement whereby the premises involved in this matter were leased to the defendant for a period of three years beginning October 1, 1943, with an option for two additional years at a rental of $75.00 per month. The option was exercised, and in the fall of 1947, while defendant was in possession of the premises under the lease, he made inquiry of one J. C. McCormick, who was the secretary and treasurer of the plaintiff corporation, as to whether the lease would be renewed and if so, the amount of the increase, if any, in the rental. After contacting the other officers of the corporation, Mr. McCormick informed the defendant that the corporation would renew the tenancy under the same terms and conditions as contained in the lease then in existence, with an increase in the rental of not more than $25.00 per month. The defendant then, in anticipation of a renewal of the lease, installed various improvements on the premises at a cost to him of approximately $1,000.00. Shortly thereafter, Mr. McCormick, with whom defendant had dealt, severed his connection with the company and in the first part of August, 1948, defendant was informed by the successor of Mr. McCormick that the tenancy would not be renewed and that the premises had been leased to other persons. The defendant then consulted his attorneys, who wrote to the attorney for the plaintiff corporation informing him of the agreement made with Mr. McCormick and the defendant's reliance thereon. A cashier's check in the sum of $75.00 was enclosed in the letter to be applied on account of the rental of said premises. Plaintiff's attorney denied the existence of any agreement between defendant and McCormick and on September 29, 1948, advised the attorneys for the defendant that prompt action would be taken to institute an unlawful detainer action in the event the defendant did not vacate the premises by September 30, 1948.

The complaint for unlawful detainer was filed October 2, 1948, and at the request of plaintiff was ordered published "at least twice for one week" and was then published in the Orange County Reporter on October 19th and 20th, 1948. No personal service of the summons was made upon the defendant. His default was entered on November 1, 1948, and on said date judgment was entered in favor of the plaintiff for possession of the premises and termination of the lease. On the same date a writ of restitution was served and the sheriff removed the defendant's merchandise and fixtures.

Prior to the removal of the merchandise and fixtures, the defendant communicated with his attorneys and an unsuccessful attempt was made by them to set aside the default by agreement. The defendant then filed a motion to set aside the default, which motion was supported by affidavits. The affidavit of defendant set forth in substance that immediately upon being informed of the attitude of the plaintiff corporation with respect to a renewal of the lease in August, 1948, he consulted his attorneys and the correspondence referred to was had by them with the attorney for plaintiff corporation. That on September 20, 1948, defendant left the City of Los Angeles on a business trip to New York and returned to Los Angeles on October 22, 1948, went to his ranch near El Centro and en route stopped at the store in Laguna Beach and nothing was said to him relative to any attempted service of process; that he returned to Los Angeles on October 25, 1948, at which time he received a registered letter addressed to him at his Los Angeles residence address; that on October 27, 1948, he delivered the letter containing a copy of the summons and complaint in the present action to his attorneys; that he did not conceal himself for the purpose of avoiding service of the summons or for any other reason and did not leave the State of California for any other purpose than to make a necessary business trip.

It appears from the affidavit of Hazel LePage, who was an employee of the defendant in charge of his business at the premises in Laguna Beach during the month of October, 1948, that no person made inquiry at the store and informed affiant of a desire to locate the defendant for the purpose of serving papers upon him; that the defendant was usually in said store only on an average of once each month or six weeks and that during the early part of the summer of 1948 she had informed an officer of plaintiff corporation of the address and telephone number of Mr. Roberts in Los Angeles.

In the affidavit of Charles S. Gass, one of the attorneys for the defendant, it is stated in substance that the attorney for the plaintiff corporation knew or should have known from the correspondence had relative to an extension of the lease that the defendant was represented by counsel; that on or about September 20, 1948, the defendant advised affiant of the business trip which he was about to take; that no request was made that defendant's attorneys accept service of the summons and complaint for him; that on or about October 28, 1948, defendant delivered the envelope containing the summons and complaint to him and affiant believed that the letter, which was registered, was sent to the defendant so that personal service could be had upon him at his residence; that an unsuccessful attempt was made to secure relief from the default judgment which affiant ascertained had been issued on November 1, 1948; that the defendant, in affiant's opinion, has a good and meritorious defense to the action.

Minnie Harrison, in an affidavit filed in support of the motion, stated that she resided in defendant's home in Los Angeles and that no inquiry was made there as to the whereabouts of the defendant; that the telephone at said residence was listed under the name of the defendant and that no persons telephoned or inquired as to the whereabouts of the defendant during his absence from the city.

Ruth Tupy, an employee of Roberts Manufacturing Company, located at 236-238 West Fifteenth Street, Los Angeles, stated in her affidavit that the defendant was the owner of the company; that one of affiant's duties as employee was to meet people coming into the office of the company; that she was instructed by the defendant before he left on his business trip to telephone his attorneys in the event that any effort was made to serve legal papers; that any person inquiring as to the whereabouts of Mr. Roberts was told that he was on a trip east and would return on or about October 22, 1948.

[1-5] The application for relief herein, having been made under the provisions of Section 473 of the Code of Civil Procedure, was addressed to the sound discretion of the trial court, and its ruling will not be interfered with by an appellate tribunal in the absence of a clear showing of abuse of such discretion. McNeil v. Blumenthal, 11 Cal.2d 566, 567, 81 P.2d 566. As was said in Armstrong v. Armstrong, 81 Cal. App.2d 316, 319, 183 P.2d 901, 904, "'In the exercise of discretion by the trial court in proceedings under the provisions of section 473 of the Code of Civil Procedure, two propositions of law seem to be definitely settled. First, that the power vested in trial courts * * * should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure, and secondly, that * * * the proper decision * * * rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion.' Again, it is said in Hecq v. Conner, 203 Cal. 504, 509, 265 P. 180, 183, that 'It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. * * * "Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits."

Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353.'" We cannot here say that a clear showing of abuse of discretion is shown by the record. Before leaving on a business trip out of the state, the defendant consulted his attorneys with reference to his lease and knew that they were corresponding with the attorney for the plaintiff relative to a continuation of the tenancy. He instructed his employees at his place of business in Los Angeles to telephone his attorneys in the event an effort was made during his absence to serve legal papers upon him. On his return, he made prompt inquiries at his Laguna place of business as to whether any effort had been made to serve papers upon him, and on October 27, 1948, he delivered the registered letter containing the summons and complaint to his attorneys. Plaintiff's attorney knew that the defendant was being represented by counsel but no request was made for an acceptance of service nor was there any inquiry from that source as to the defendant's whereabouts or whether he expected to vacate the premises. Plaintiff made a few inquiries which resulted in securing a report from an unknown source that the defendant was away from the city but would be back in the latter part of October. The affidavits, containing hearsay statements and conclusions were then executed and filed and an order obtained providing for publication of the summons "at least twice for one week". The affidavit of publication shows that the summons was actually published only two days, October 19th and October 20th, 1948. It is quite evident that both the defendant and his attorneys expected a personal service of the summons and complaint and did not anticipate that a publication of summons would be had, and if so, that it would be accomplished within such a limited time.

[6] Ordinarily, publication of summons against a defendant residing out of the state or absent therefrom must not be less than two months. However, exception is made in the case of summary proceedings to obtain possession of real property in certain cases and in those cases publication must be for a reasonable length of time. Sec. 413, Code Civ.Proc. While the publication for two successive days may be a reasonable time under certain circumstances, a point which we are not here deciding, nevertheless, it was not unreasonable for the defendant and his attorneys to believe that publication of summons would not be had in the instant action under all of the attending circumstances. The record does not show, as contended by the plaintiff, that the default of the defendant was deliberate nor that the defendant absented himself from the state for the purpose of avoiding process.

[7, 8] The plaintiff claims that the affidavits filed by defendant in support of the motion failed to show that the defendant had a good defense to the action on the merits. The affidavit of the attorney for the defendant contains a statement to the effect that the matter set forth in his affidavit was discussed with the defendant and with Mr. McCormick, the former secretary and treasurer of the plaintiff corporation and that affiant had advised defendant that he had, in affiant's opinion, a good and meritorius defense to the alleged cause of action set forth in the complaint.

The affidavit of the defendant contains a statement that the defendant fully and fairly stated to his attorney all of the facts of said cause and that he was informed by said attorney that he had a good and meritorius defense to the action.

An equitable defense is pleaded in the answer, and we are of the opinion that a sufficient prima facie showing of merit was made by the affidavits and proposed answer of the defendant. The statement of facts on the showing of merits need only embody ultimate facts. Thompson v. Sutton, 50 Cal.App.2d 272, 279, 122 P.2d 975.

The order vacating and setting aside the default judgment is affirmed.

BERNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

94 Cal.App.2d 926

KALITERNA v. WRIGHT et al.

No. 14143.

District Court of Appeal, First District,
Division 1, California.
Dec. 6, 1949.

Hearing Denied Feb. 2, 1950.

Mary Kaliterna sued Ellen G. Swall for declaratory relief determining a lease to be in force and that an option to renew had been validly exercised. Upon death of the defendant, Nellie Swall Wright and Ada E. McPheeters, individually and as executrices of the estate of Ellen G. Swall, deceased, were substituted as defendants.

A judgment in favor of plaintiff was entered by the Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., and the defendants appealed.

The District Court of Appeal, Bray, J., reversed the judgment, holding that evidence supported findings that lease was in force and that option to renew had been validly exercised, but that trial court erred in attempting to determine reasonable value of rental for new term instead of submitting question to arbitration as provided in the lease.

1. Appeal and error 🔑1039(2)

Judgment granting declaratory relief would not be reversed because of missing allegations in the pleadings concerning matters treated as trial issues.

2. Declaratory judgment 🔑367

The court in actions for declaratory relief may refuse to submit disputed questions of fact to jury and may itself determine them.

3. Declaratory judgment 🔑367

In action for declaratory relief determining a lease to be in force and that an option to renew had been validly exercised, failure to submit fact issues to jury after trial court had previously stated that it would determine equitable questions and reserve jury for questions of fact was not error.

4. Trial 🔑377(2)

The matter of reopening a case for further evidence is entirely in trial court's discretion.

5. Trial 🔑377(2)

In action for declaratory relief determining lease to be in force and an option to renew had been validly exercised, where plaintiff contended that no taxes had ever been assessed on improvements placed by plaintiff on leased premises, trial court did not abuse its discretion in granting plaintiff permission to reopen case to offer in evidence certificate of tax assessor to effect that improvements had not been assessed.

6. Trial 🔑378

Where after case was finally submitted for decision defendants filed document in which they stated that they "hereby interpose their objection and exception" to exhibits which plaintiff's counsel advised where to be filed, if document was an objection to exhibit which was admitted in evidence and which defendants heard read and as to which they made no objection, objection came too late.

7. Judgment 🔑219

Where findings are required and are not waived, a judgment without findings is a nullity. Code Civ.Proc. §§ 632, 633.

8. Trial 🔑403

Where findings of fact in action for declaratory relief were actually signed before judgment but were not on file at time of signing and filing judgment, trial court properly ordered findings filed nunc pro tunc as of date of their signing. Code Civ. Proc. §§ 632, 633.

9. Landlord and tenant 🔑33, 86(1)

Evidence supported finding that rental under lease of unimproved property was modified by mutual agreement and that reduced rental for entire period was paid by lessee, so that lessee was not precluded from renewing lease pursuant to option therein on ground that she had previously breached lease by not paying required rentals.

10. Landlord and tenant 🔑86(1)

Evidence failed to show that lessee's proceedings in bankruptcy court in which she received a discharge as bankrupt or the occupancy of leased premises by her vendees constituted an interruption of lessee's occupancy under lease, so as to constitute a breach of lease and preclude lessee from renewing the lease pursuant to option contained therein. Civ.Code, § 1698; Bankr. Act, § 74, 11 U.S.C.A. § 202.

11. Landlord and tenant ⚷86(1)

Evidence supported finding that no taxes had been levied upon improvements placed on leased property by lessee, so that her failure to pay taxes would not constitute a breach of covenant contained in lease requiring her to pay taxes.

12. Landlord and tenant ⚷156

Lessee's failure to keep leased premises covered by fire insurance as provided in lease could not be considered a breach of lease, where lessee showed that insurance company refused to allow any more insurance on premises because of frequent fires along the highway.

13. Landlord and tenant ⚷86(1)

Evidence established that if living upon leased premises in addition to conducting business thereon constituted a violation of clause in lease which stated that property was leased for purpose of conducting business thereon, such violation was waived by failure of lessors to object to its being so used prior to time lessee sought to renew lease pursuant to option contained therein.

14. Landlord and tenant ⚷86(1)

Evidence supported finding that any breach of lease by lessee's making structural changes on property placed by her on leased premises without asking permission of lessors was waived, so that it would not prevent lessee from enforcing renewal covenant contained in lease.

15. Landlord and tenant ⚷86(1)

Lessee was entitled to renew lease under option contained therein, though there had been some minor breaches of lease, where breaches were waived by lessors.

16. Executors and administrators ⚷224

The right to renewal of lease under option contained therein which accrued prior to death of lessor was not required to be presented in probate court. Probate Code, § 709.

17. Principal and agent ⚷23(5)

Evidence supported finding of ostensible agency in lessor's son-in-law to receive notice of lessee's intention to renew lease pursuant to option contained therein.

18. Declaratory judgment ⚷384

Where action for declaratory relief determining lease to be in force and that option to renew had been validly exercised was commenced against lessor shortly before her death, and later lessor's daughters, as executrices of her estate were substituted as defendants, and still later daughters were added in their individual capacities, trial court properly included daughters in their individual capacity in the judgment in view of qualifications contained in disclaimer filed by them and statement in plaintiff's exhibit that daughters had received a gift deed to the property from lessor in her lifetime.

19. Declaratory judgment ⚷369

Trial court's finding that defendants, individually and as executrix "claim" the ownership of leased property was a sufficient finding of ownership for purpose of action for declaratory relief determining lease to be in force and an option to renew had been validly exercised.

20. Declaratory judgment ⚷369

Fact that trial court did not directly find on allegations of cross-complaint did not invalidate judgment granting declaratory relief, where trial court's findings on allegations of second amended complaint and amendment thereto, the denials and affirmative allegations of the answer, constituted a negation of allegations of the cross-complaint.

21. Landlord and tenant ⚷86(2)

Notice of lessee's intention to exercise her option to renew and a request for a meeting to determine rental or to arrange for arbitration was sufficient notice under terms of the lease.

22. Landlord and tenant ⚷86(1), 95

Lessee's right to renew pursuant to option contained in lease was complete as soon as she complied with terms of lease, and lessor's death thereafter did not cause lessee's right to renew to lapse.

23. Contracts ⚿284(1)

Courts recognize and enforce written agreements to arbitrate. Code Civ.Proc. §§ 1280 et seq., 1284.

24. Declaratory judgment ⚿366

Where lease containing option to renew provided that parties should agree on rental for new term or have it set by an arbitrator, declaratory judgment determining option to renew had been validly exercised should not have attempted to determine reasonable value of rental but should have offered parties the opportunity to submit question of rental to arbitration as provided in lease. Code Civ.Proc. §§ 1280 et seq., 1284.

Earl C. Berger, San Francisco, for appellants.

Joseph A. Brown, Harry Gottesfeld, San Francisco, for respondent.

BRAY, Justice.

In an action for declaratory relief, defendants appealed from a judgment in favor of plaintiff determining a lease to be in force and that an option to renew had been validly exercised.

Facts.

Resolving conflicts in favor of plaintiff, the evidence shows the following:

In 1935 plaintiff noticed the property here involved, which was then unimproved real property along Bayshore Highway in Santa Clara County near Moffet Field, and investigated to determine if it was available for rental. Some one told her that the land belonged to Mr. and Mrs. Swall and that a Mr. Wright had charge of the property, so she saw Wright about leasing it. (Wright was the son-in-law of the Swalls and was in business as a realtor.) She negotiated with Wright and eventually signed a ten year lease, which provided for rent at $25 monthly for the first year, $30 monthly during the second year, and $35 monthly thereafter for the last eight years. The lease was to run from February 1, 1935, to January 31, 1945. An option for renewal could be exercised by giving notice to the lessor or his agent sixty days prior to the expiration of the lease. At that time the parties would agree on the rental for the new term or have it set by an arbitrator who would be selected by a nominee of each party. (The lease contained other provisions which will be noted as is necessary.) Wright had negotiated the lease and signed it as a witness.

Plaintiff went into possession and erected a building on the premises. Whenever she had anything to do concerning the property she saw Wright. She only saw Mr. Swall once, shortly after the lease had begun. He came into the building, introduced himself, complimented her on the appearance of the place, and told her to see Wright, who had full authority, if she needed anything.

Mr. Swall died in October, 1935, and Mrs. Swall apparently became sole owner of the property.

Wright told plaintiff to pay the rent to Mrs. McPheeters (another daughter of the Swalls and the sister of Mrs. Wright). This was done. Early in 1936 when the rent was due to go up, plaintiff spoke to Mrs. McPheeters and asked if the rent could remain at $25 because of her distressed financial condition. Mrs. McPheeters said she would talk to Wright. Thereafter Wright told plaintiff he had talked to Mrs. McPheeters and the Swalls and that $25 would be satisfactory. Thereafter plaintiff paid $25 monthly, which was accepted. Payment was usually by check which was endorsed by Mrs. McPheeters.

Mrs. McPheeters testified that the rent was not paid for nine months of 1937, but plaintiff stated that it was. At any rate, Mrs. McPheeters testified that she thereafter accepted rent each month at $25 monthly through 1944, that she had not complained to plaintiff that the lease was not being performed, no notice was served on plaintiff and no new writing was signed by the parties.

Since the lease would expire on January 31, 1945, a notice of renewal would have to be served on Mrs. Swall or her agent before December 1, 1944. Early in September of 1944 plaintiff's attorney, Gottesfeld, sent plaintiff some notices of renewal and told her to serve them. She went to see Wright who said there was plenty of time before the lease would expire and she need not be in a hurry. He said Mrs. Swall was very ill and could not be disturbed, but that he would take care of serving her with one of the notices. Thereafter he told plaintiff that he had served Mrs. Swall. The notice contained a request for discussion as to the new rental rate or arranging for arbitration in accordance with the lease.

Gottesfeld returned from a trip East in November. He spoke to Wright, who said that the new lease should be prepared by a lawyer, and that one Berger would represent the lessors. (Berger, attorney for defendants, is the son-in-law of the Wrights.) Gottesfeld thereupon phoned Berger and asked what was being done. Berger replied that he was busy, that Mrs. Swall was too sick to be disturbed, and that he would talk to Gottesfeld later about the renewal of the lease. On November 30, two days after the phone call, Gottesfeld wrote Berger, asking Berger to phone him the following day.

Gottesfeld next prepared new notices, had them signed by plaintiff, and sent them, on December 1, 1944, to Berger, Wright, and Mrs. Swall, so that there would be no argument about the notice having been given. On December 4 Berger wrote Gottesfeld denying that plaintiff had any right to renew the lease.

This was apparently the first intimation to plaintiff that the lessors thought the lease had been breached in any way. Although on one occasion, at least, she sold the business, she always kept her interest in the lease. The lease required the tenant to pay taxes on improvements, but there was conflicting evidence whether any taxes were ever assessed on the improvements and there was no evidence of any demand for such taxes or that any were paid by any one. The lease required the tenant to keep insurance on the improvements, but the only reference to this point was plaintiff's statement that she kept insurance in force until the insurance companies refused to give any more insurance because of frequent fires along the highway. The lease provided that the property was leased "for the purpose of conducting business thereon," but plaintiff denied she had ever converted part of the premises into residential quarters. The lease provided that the tenant should not make any alterations without the written permission of the lessors, and plaintiff admitted that in 1936 or 1937 she had enlarged the building somewhat without getting such permission. There was no evidence that the lessors had ever complained or that the alteration was not for the benefit of the property.

Following Berger's letter of December 4, there was a further exchange of letters reaching no agreement, and plaintiff filed this action for declaratory relief on December 12, naming Mrs. Swall as defendant. She died December 25, 1944, and her daughters (Mrs. McPheeters and Mrs. Wright) were named executrices. In March of 1945 the superior court issued an order substituting them as defendants. They were also joined as individuals, since there was a possibility they had received the property prior to the death of Mrs. Swall by gift deed.

Pleadings.

[1] Defendants raise many legal questions, many of them highly technical. They contend that there was no valid complaint before the court, a demurrer having been sustained to the last complete amended complaint. This was the seventh complaint. Thereafter plaintiff filed an "Amendment to Second Amended Complaint." The pleadings are quite confusing. However, defendants are precluded from raising the point here for two reasons: first, they did not urge it at the trial, and secondly, the state of the pleadings was clarified by stipulation. A discussion arose as to whether defendants had answered the "second amended complaint." After some discussion of the matter, and

without any contention by defendants that there was no "second amended complaint" in existence, the following occurred:

"Mr. Berger: Well, I will take that stipulation.

"Mr. Brown: Now, that stipulation is that your answer denominated 'Answer and Cross-Complaint,' filed April 18, 1946, shall be deemed the answer to the second amended complaint and the amendment thereto.

"Mr. Berger: And I want my reply to your amendment to stand, you made an amendment to your amended complaint, didn't you, and I answered that?

"Mr. Brown: Just one short paragraph. Now, that is all deemed as applicable to the second amended complaint, is that right?

"Mr. Berger: Right.

"Mr. Brown: Now, your Honor, I think that the record is clarified on that. Now, your Honor—"

In their demurrers to the various complaints defendants urged that no copy of the lease was attached to the particular complaint. In view of the stipulation and the fact that the execution of the lease was admitted, the failure to attach a copy to the pleadings is unimportant.

Point is made of the fact that the executed oral modifications of the lease were not pleaded. No objection to the introduction of evidence concerning the modifications was made and they were treated as an issue by both sides at the trial. Courts do not reverse judgments because of missing allegations in the pleadings concerning matters treated as trial issues. This is well shown by the decisions allowing the trial court to instruct on such issues. See Megee v. Fasulis, 65 Cal.App 2d 94, 101, 150 P.2d 281.

Denial of Jury Trial.

[2, 3] While the court stated, in effect, that it would determine the equitable questions and reserve the jury for questions of fact, it actually decided all questions itself. Defendants contend these fact issues should have been submitted to the jury. Defendants cite no authority to support their position. It is well settled in this state that in actions for declaratory relief the court may refuse to submit disputed questions of fact to a jury and may itself determine them. Herrlein v. Tocchini, 128 Cal.App. 612, 18 P.2d 73; Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 161 P.2d 217, 162 A.L.R. 747.

Reopening Case.

[4, 5] Plaintiff contended that no taxes were ever assessed on the improvements. After the case was submitted, plaintiff asked permission to reopen to offer in evidence the certificate of the tax assessor to the effect that the improvements had not been assessed. Defendants did not object to the reading into evidence of the certificate. In fact, they then asked and received permission to put Mrs. McPheeters on the stand to testify that taxes were paid on the improvements. The matter of reopening a case for further evidence is entirely in the discretion of the trial court. There was no abuse of that discretion.

[6] After the case was finally submitted for decision defendants filed a document in which they stated that they "hereby interpose their objection and exception" to exhibits which plaintiff's counsel advised were to be filed. If this is an objection to an exhibit which was admitted in evidence and which they heard read and as to which they made no objection, the objection comes too late. Moreover, there are no grounds given.

Nunc Pro Tunc Findings.

[7, 8] On January 5, 1948, the court signed findings of fact and conclusions of law. For some reason they were not filed before the judgment was signed and filed. This was on January 8. Thereafter, on July 2, pursuant to motion and after argument, the court ordered the findings and conclusions to be filed nunc pro tunc as of January 5. We have recently held that, where findings are required and are not waived, a judgment without findings is a nullity. However, here there were findings actually signed before the judgment. The fact that they were not on file at the time of signing and filing the judgment is not important. They were in existence

and were the basis of the judgment. The court was well within its rights in ordering them filed nunc pro tunc as of the day of their signing. Defendants have cited no case holding otherwise. "Notwithstanding sections 632 and 633 of the Code of Civil Procedure make it essential to a decision of a case tried without a jury and in which findings are not waived, that findings of fact and conclusions of law must be made and filed, the court has the same authority to order such findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered." Norton v. City of Pomona, 5 Cal.2d 54, 62, 53 P.2d 952, 956.

Was Plaintiff Entitled to Renew?

[9-14] Defendants contend that plaintiff had breached the lease in many ways and therefore was not entitled to renew. These claimed breaches were: (1) That plaintiff had not paid the agreed rental. The court found that the rental was modified by mutual agreement and that the reduced rental for the entire period was paid. The evidence on this subject was conflicting, but there was sufficient to support the court's finding. (2) That plaintiff was not in continuous occupancy during the ten years. The evidence supports the finding that she was. During a portion of the time the vendees to whom plaintiff sold the tavern business conducted on the premises were the actual occupants, and for a period plaintiff subjected herself to proceedings under section 74 of the Bankruptcy Act. 11 U.S.C.A. § 202. There was no provision against assigning the lease or subletting. Defendants contend that the rent was not paid during this period. Plaintiff testified and the court found that it was. While the evidence might support defendants' contention that the acceptance of less rental did away with the lease, and that thereafter plaintiff occupied the premises on a month to month tenancy, nevertheless it also supports the theory upon which the court acted, that it constituted merely an executed oral amendment of the lease. The change of rental did not constitute a novation, and hence Garthofner v. Edmonds, 74 Cal.App.2d 15, 167 P.2d 789, and McClintick v. Frame, 98 Cal.App. 338, 276 P. 1033, discussing consideration for a novation, do not apply. It constituted an executed oral agreement. See Civil Code, § 1698. Plaintiff testified that in 1936 she "went into bankruptcy" and later received a discharge. There is no evidence in the record as to what took place, whether the trustee accepted or rejected the lease, and hence In re Neff, 6 Cir., 157 F. 57, 28 L.R.A.,N.S., 349, and Summerville v. Kelliher, 144 Cal. 155, 77 P. 889, do not apply. Neither the proceedings in the bankruptcy court nor the occupancy by her vendees constituted an interruption of plaintiff's occupancy under the lease. (3) That plaintiff did not pay taxes on the improvements. There was evidence, which the court believed, that no taxes were levied upon the improvements. As no taxes were levied there could be no breach of this covenant. (4) That plaintiff did not comply with the covenant requiring her to keep the premises covered by fire insurance. She testified that the insurance company refused to allow any more insurance because of frequent fires along the highway. There was no dispute of this testimony. If, through no fault of plaintiff, this covenant could not be complied with, her failure to do so cannot be considered a breach of the lease. (5) That the premises were and are being used for residential as well as business purposes, while the lease restricts their use to business purposes. It is doubtful if living upon premises which are also being used for the conducting of a tavern constituted a violation of a clause which merely states that the "property is hereby leased for the purpose of conducting business thereon." If it does, such violation was waived, as at no time did defendants object to its being so used. (6) That plaintiff made structural changes without asking permission. Plaintiff admitted that in 1936 or 1937 she had enlarged the building without getting permission of the owners. As the alteration was for the benefit of the property and was never objected to during the long period of the lease, any breach of the lease thereby was waived.

[15] Defendants take the position, particularly applicable to the alleged breach of the lease by failure to pay the stipulated rent and by the making of alterations without permission, that a landlord's waiver of the performance of the covenants of a lease does not entitle a tenant to a renewal of the lease; that a waiver will prevent a forfeiture under the lease, but that to enforce a renewal covenant the tenant must prove full performance of all covenants of the lease. They rely principally on Behrman v. Barto, 54 Cal. 131, and Swift v. Occidental Mining etc. Co., 141 Cal. 161, 74 P. 700. The first case is merely authority for the well established principal that the right to enforce the renewal provision of a lease depends upon the tenant performing the terms of the lease. The Swift case holds that the mere failure of the landlord to insist upon a forfeiture for waste or breach of covenant, does not preclude the landlord from refusing to grant another term. The case expressly holds that there was no waiver of performance of the conditions of the lease. In the case at bar there was such waiver. Neither of the above cases are authority for defendant's contention that oral modifications of a lease, or breaches that are waived, justify a refusal to grant a renewal provided in the lease.

The correct view is stated in Title Insurance & Guaranty Co. v. Hart, 9 Cir., 160 F.2d 961, which held a tenant entitled to renew although there had been some minor breaches of the lease. The decision points out that the language about forfeitures and renewals in the Swift case was not necessary to the decision of that case, 160 F.2d at page 970, and suggests that failure to renew a lease where the tenant had made large investments and improved the property would be "in the nature of a forfeiture," so that the court, under general equitable principles, should be careful to protect the tenant. 160 F.2d at page 971.

In the present case there was no breach by plaintiff which would justify a court in holding that plaintiff had lost the right to renew. Under any reasonable standard, plaintiff here had fully performed, entitling her to renew by exercising the option. The evidence here shows that the lessor agreed to accept, and did accept, the reduced rental over the largest portion of the leased term; also, that the only proved breaches of the lease were waived. Moreover, the lease contained a grant of an option to renew, which was not made conditional upon the full performance of the terms of the lease.

Probate Court.

[16] In a more or less off-hand manner, defendants intimate that the only court which would have jurisdiction to order the granting of a renewal was the probate court in which the estate of Ellen G. Swall was being probated. No authority is given for this statement, and none could be given. The right to a renewal which accrued prior to the death of Mrs. Swall is not the type of claim which must be presented under section 709 of the Probate Code. See Wright v. Superior Court, 85 Cal.App.2d 151, 192 P.2d 511 (an action brought to prohibit the prosecution of this action in the trial court upon the ground that no claim had been filed in the Swall estate).

Agency.

[17] Defendants contend that the evidence does not support the court's finding of ostensible agency in Wright. Plaintiff was told by Mr. Swall that Wright had full authority if she wanted anything. Whenever she had anything to do concerning the property she saw Wright. Wright told plaintiff to pay the rent to Mrs. McPheeters. When plaintiff in 1936 asked Mrs. McPheeters to permit the rent to remain at the then figure, she stated she would talk to Wright. It was Wright who informed plaintiff that the lower rental would be acceptable. Wright informed plaintiff in 1944 that Mrs. Swall was ill and could not be disturbed. He took the renewal notices from plaintiff and said he would give one to Mrs. Swall. He thereafter stated that he had done so. The circumstances show an ostensible agency in Wright, and they also show that Mrs. Swall received the notice. When plaintiff's lawyer spoke to Wright about the renewal, he was referred to defendants' attorney, who also stated that Mrs. Swall was to ill to be disturbed, but he would talk about the renewal later. The lease provided that the notice to renew

might be served upon the lessors or their agents or attorneys. Bard v. Kent, 19 Cal. 2d 449, 122 P.2d 8, 139 A.L.R. 1032, is not in point. There the lessor died before the tenant attempted to exercise his option. Here, Mrs. Swall was alive, not only at the time of the exercise of the option, but at the time of suit.

Parties.

[18] This action was commenced against Mrs. Swall shortly before her death. Later the executrices of her estate were substituted as defendants. Still later these executrices were added in their individual capacities. They as individuals filed a disclaimer in which they stated that they claimed no interest in the property involved except as beneficiaries under Mrs. Swall's will "under which the said property is not specifically devised to us as individual owners, but only as trustees, and further point out that said real property is not specifically mentioned in said will, but forms a part of the general assets of the estate." Just what these qualifications in the disclaimer mean is difficult to understand. In view of this, and a statement in plaintiff's Exhibit 8 to the effect that the individual defendants had received a gift deed to the property from Mrs. Swall in her lifetime, the court properly included them in the judgment.

Findings.

[19] While the findings are by no means models, they sufficiently cover the matters which defendants contend were not found. They are not specific. They find that the designated paragraphs of the second amended complaint and the amendment thereto are true and that the denials in certain paragraphs and the allegations in other paragraphs of the answer are untrue. Plaintiff alleged and the finding found that defendants individually and as executrices "claim" the ownership of the leased property. This is a sufficient finding of ownership for the purposes of this action.

[20] The court did not directly find on the allegations of the cross-complaint. However, its findings on the allegations of the second amended complaint and amendment thereto, the denials and affirmative allegations of the answer, constitute a negation of the allegations of the cross-complaint.

Renewal Notice.

[21, 22] Defendants contend that the notice to renew was not sufficient because it gave notice of plaintiff's intention to exercise her option to renew. It further requested a meeting to determine the rental or to arrange for arbitration. It was a sufficient notice under the terms of the lease. Nor does the fact that Mrs. Swall died after being notified, change the situation any. Plaintiff's right to renew was complete as soon as she complied with the terms of the lease. The death of Mrs. Swall thereafter did not cause plaintiff's right to renew to lapse. McDonald v. McElroy, 60 Cal. 484, relied upon by defendants, is not in point, as it dealt with rights which did not arise until after the death of the deceased.

Relief Granted.

[23, 24] In its judgment the court ordered defendants to enter into a new lease under substantially the same terms as the old lease, except that it fixed the rental at $50 per month. It took no evidence upon the subject, evidently basing the amount on testimony of plaintiff that during negotiations for settlement of the controversy defendants had offered to accept that rental. The court had no power to fix a rental without taking evidence. The real question here is whether the court should have taken evidence upon the subject or given the parties an opportunity to determine the matter by arbitration as set forth in the lease. In determining that question it is important to consider the complaint. This was an action for declaratory relief. The amended complaint set up that a dispute had arisen between the parties with reference to their rights, duties and obligations under the lease, as to the provision calling for arbitration in case the parties could not agree on the rental, and as to whether plaintiff had breached it, and asked the court to declare that plaintiff had not breached the lease in any manner, that it was still in force, to declare the rights

of the lessor and lessee in the real property under the lease, "decreeing and determining a fair rental" and requiring the lessor to execute "a renewal of said lease for a rental as determined by said arbitration" etc. Thus, it will be seen that what the plaintiff asked for primarily was a declaration of her rights and a renewal of the lease for a "rental as determined by said arbitration." While, in a sense, defendants refused to appoint an arbitrator as provided in the lease, their refusal was based upon their contention that no lease existed by which plaintiff was entitled to a renewal, plaintiff holding, as they claimed, only under a month to month tenancy, and also, if the lease existed, it had been so breached that plaintiff was not entitled to a renewal. Under the circumstances of this case, when the court declared that plaintiff was entitled to a renewal, it should have given the parties an opportunity to proceed under the provisions of the lease and appoint arbitrators. That this is the proper procedure is shown by section 1284 of the Code of Civil Procedure which provides: "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration." Minton v. Mitchell, 89 Cal.App. 361, 265 P. 271, was a definite refusal of arbitration and was not an action for declaratory relief. Moreover, the theory of the court (which theory is no longer the law) was that the courts would not enforce an agreement to arbitrate, and notwithstanding such agreement, the courts would determine all disputes between the parties. The cases cited by plaintiff on this point from other jurisdictions as well as California do not apply. They, too, hold that the courts will not enforce agreements to arbitrate. However, since 1927, when Title X, section 1280 et seq., were added to the Code of Civil Procedure, it is the settled policy in this state that the courts will and do recognize and enforce written agreements to arbitrate. See Witkin, Summary of California Law, vol. 2, 6th Ed., pp. 1475–6. Moreover, even prior to the enactment of section 1280 et seq., the California courts enforced agreements which provided for " 'A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property and the like * * *.' " Bewick v. Mecham, 26 Cal.2d 92, 156 P.2d 757, 157 A.L.R. 1277. See also Rives-Strong Bldg., Inc. v. Bank of America, 50 Cal.App.2d 810, 123 P.2d 942.

The judgment is reversed and the cause remanded with instructions to the trial court to afford the parties an opportunity to submit the question of rental to arbitration as provided in the lease. In the event of the failure or refusal of defendants to submit to arbitration, then the court shall take evidence of the reasonable value of the rental. Upon determination of the rental value, the court shall order judgment for a renewal in accordance with the views here expressed. Plaintiff is entitled to recover costs.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

94 Cal.App.2d 906

In re McPHERSON'S ESTATE.

Civ. 16875.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1949.

Proceeding in the matter of the estate of Marion McPherson, also known as Marion F. McPherson, deceased, wherein Elizabeth McPherson sought to have a waiver and assignment of her interest in the estate to Lena E. Missamore set aside.

The Superior Court of Santa Barbara County, Ernest D. Wagner, J., rendered an order in favor of Elizabeth McPherson, and Lena E. Missamore appealed.

The District Court of Appeal, Drapeau, J., affirmed the order, holding that evidence sustained finding that waiver was executed by Elizabeth McPherson without understanding its nature and import and without intending to disinherit herself, and that it was procured by undue influence of Lena Missamore, warranting the setting aside of the waiver.

See also Cal.App., 202 P.2d 565.

1. Descent and distribution 🔑86

If probate court finds consideration for waiver and assignment by heir of all interest in lessee's estate grossly unreasonable, or that assignment was procured by duress, fraud, or undue influence, probate court may refuse to make distribution under the assignment, except on such terms as it deems just and equitable. Probate Code, § 1020.1.

2. Appeal and error 🔑989

The power of the District Court of Appeal begins and ends with the determination from an examination of the record that there is substantial evidence to support order of trial court.

3. Descent and distribution 🔑86

Mother was entitled to have waiver and assignment made in favor of daughter as to all interest in deceased son's estate set aside, where evidence sustained finding that waiver was executed by mother without understanding its nature and import, or without intending to disinherit herself, and that it was procured by undue influence of the daughter. Probate Code, § 1020.1.

4. Descent and distribution 🔑86

Application of statute authorizing probate court to inquire into circumstances surrounding execution of assignments by heirs of a deceased before distributing deceased's property, must be left to the sound discretion of the probate judge, and appeals from orders made pursuant to the statute are governed by general rules on appeal. Probate Code, § 1020.1.

5. Appeal and error 🔑931(1), 1010(1)

Generally, on appeal, an appellate court will review evidence in light most favorable to respondent, will not weigh evidence, will indulge all intendments which favor sustaining the finding of the trier of fact, and will not disturb the finding if there is substantial evidence in record in support thereof.

West, Vizzard, Howden & Baker, Bakersfield, for appellant.

H. H. Bell, Bakersfield, Canfield & Westwick and Stanley T. Tomlinson, Santa-Barbara, for respondent.

DRAPEAU, Justice.

Elizabeth McPherson in her younger days lived in the Cuyama Valley, not far from where Kern, San Luis Obispo, and Santa Barbara counties come together. She and her husband were homesteaders. They raised a family of four girls and one boy. Two or three of the girls were born there. The land wasn't much good; it was dry farming; it didn't rain much, and times were always hard.

After her husband died, Mrs. McPherson lost the old homestead. She had to borrow a few hundred dollars on it; could not repay the loans or pay interest, and the mortgages were foreclosed. Certain unscrupulous, speculative money lenders used this method to acquire land in that section.

In 1916 Mrs. McPherson's only son passed away. He too had a homestead in the Cuyama; 320 acres of dry land, about ninety acres fit to farm. The mother was his sole heir, and she lived on the son's homestead until 1938.

While Mrs. McPherson was living on this property she pledged it also for about $150, in two small loans. She could not repay these loans, and was thus left to the tender mercies of the unscrupulous lender, who was about to foreclose. And as a final evidence of rude and frowning Fortune, the cabin in which she lived burned to the ground, with all her meager possessions.

It was then that her daughter, Lena E. Missamore, and Lena's husband came to the rescue. Lena and her husband paid the loans out of their own money; they also built and furnished a new cabin for the mother to live in. And in extra dry years they hauled drinking water to the ranch.

In 1938 the mother went to live with Lena at Taft, California. With the exception of the first 18 months she was there, her board and room, however, were paid for out of an old age pension. She visited her other girls and was on good terms with all of them.

In 1940 probate proceedings were commenced in Santa Barbara county to clear title to the deceased son's homestead. Mrs. McPherson nominated her daughter Lena as administratrix of the estate; the daughter qualified and was appointed. The probate proceedings lagged along for many years. Notice to creditors was given in 1942.

In 1943 Mrs. McPherson went to the office of Lena's lawyer in Taft, in company with Lena and Lena's husband, and executed a waiver and assignment in favor of Lena of all of her right, title, and interest in the son's estate. After a couple of years the assignment was filed in the probate matter.

In 1948 oil was discovered in the Cuyama. Everybody began to check up on titles to lands which theretofore had been thought to have little value; and to show an interest in persons owners thereof. The daughters of this old lady evidently became concerned about her property rights.

[1] In 1948 first and final account in the probate matter was filed; with petition for distribution to Lena, in accordance with the waiver. Counsel for the mother appeared, seeking to have the waiver set aside, pursuant to the provisions of Probate Code Section 1020.1. This section requires the Probate Court to inquire into the consideration for assignments like the one here involved, and into the circumstances surrounding the execution thereof. If the court finds the consideration grossly unreasonable, or that the assignment was procured by duress, fraud, or undue influence, it may refuse to make distribution under the assignment, except upon such terms as it deems just and equitable.

Issues were framed on affidavits, and testimony was taken. At the trial the mother was 82 years of age. She testified that she could neither read nor write; that she had no recollection of signing the waiver; that she did not intend it; and that she wanted her property to go to her four girls, share and share alike.

The trial court found that the waiver was executed by Mrs. McPherson without understanding its nature and import, or intending to disinherit herself; that there was no consideration therefor; and that it was procured by undue influence of the daughter Lena. Order was made setting the waiver aside, and distributing the son's estate to the mother. From this order the daughter Lena has appealed.

[2, 3] Counsel for appellant devote many pages of their briefs to argument as to the weight, value, and effect of the testimony. The power of this Court begins and ends with the determination from an examination of the record that there is substantial evidence to support the order. The testimony of Mrs. McPherson as stated is sufficient, under our law of appeals in California, to sustain the order vacating the waiver and distributing the estate to her.

And the circumstances surrounding the making of the assignment are sufficient to sustain the finding of undue influence. While it is true that Lena was kind to the old mother, and there is no evidence that the other girls did much if anything for her, there was a relationship of highest trust and confidence between the mother and this daughter. And it is to be remembered that this is not a contest among the four daughters. All that is involved is the judicial determination that the mother shall possess and enjoy, and may finally dispose of by her will, property which the law gives to her as the sole heir of her son.

Were the order based only upon the finding of insufficient consideration some other disposition of the case would be required; for, in the circumstances here shown, there is no support for a finding that the consideration was grossly unreasonable. On the contrary, there is ample evidence of that love and affection between this mother and daughter which would be good consideration for a conveyance of property from one to the other.

[4] Application of the Probate Code section involved must be left in great measure to the sound discretion of the probate judge. And appeals from orders made pursuant to the section are governed by the general rules on appeal in this state.

[5] As was said in Re Estate of Isenberg, 63 Cal.App.2d 214, at page 216, 146 P.2d 424, 425: "It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. * * *

"* * * the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact."

The rule is stated, and a host of decisions supporting it cited, in 2 Cal.Jur. at pages 921 et seq. It is the settled policy of the law of California that it is the province of the trier of fact to decide, and when his decision is based upon substantial evidence in the record, it will not be disturbed on appeal.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

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95 Cal.App.2d 23

BUTLER v. STRATTON.

Civ. 17169.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1949.

Alice H. Butler sued Julia W. Stratton to quiet title to property on ground that in her lifetime, the owner thereof had by will devised such realty to plaintiff, wherein defendant by affirmative defense alleged that owner prior to her death had conveyed the property to her by grant deed.

A judgment for defendant was entered in the Superior Court, Los Angeles County, John Gee Clark, J., and the plaintiff appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgment on the grounds that plaintiff, by failing to file affidavit denying deed on which defendant relied within ten days as required by law admitted its genuineness and due execution, and that trial court did not abuse its discretion in denying plaintiff's motion to reopen case to permit plaintiff to file an affidavit.

1. Trial 🔑59(1)

The prevailing practice is to meet proof of affirmative defenses after defendant has rested.

2. Trial 🔑59(1)

Trial court has duty to determine order of proof.

3. Trial 🔑377(1)

In action to quiet title to realty, where plaintiff was claiming title as devisee, and defendant by affirmative defense alleged that testatrix prior to her death had conveyed property to her by grant deed, trial court was not required to permit plaintiff on her direct examination to introduce evidence as to deed pleaded by defendant.

4. Evidence 🔑471(2)

In action to quiet title to realty, where plaintiff was claiming title as devisee, and defendant by affirmative defense alleged that testatrix prior to her death, had conveyed the property to defendant by grant deed, objection to question asked defendant on cross-examination as to whether she resided in property by permission of testatrix was correctly sustained as calling for a conclusion.

5. Wills 🔑722, 767

Title of a decedent's property vests in devisees and legatees upon testator's death subject to administration, but the bequest is of no avail if testator has conveyed the property to another at a time antedating the will.

6. Wills 🔑6

Fact that decedent's will conveying property to plaintiff was admitted to probate proved nothing with respect to title of the property at time of decedent's death.

7. Wills 🔑6

Fact that testatrix exercised ownership of property after executing a grant deed thereof to defendant, who was her daughter-in-law, held record title thereto and declared to her attorney when she executed will devising property to plaintiff, who was testatrix' sister, that she owned property, did not give rise to presumption that testatrix did, in fact, own it.

8. Deeds 🔑196(2)

In action to quiet title to realty, where plaintiff was claiming title as devisee and defendant by affirmative defense alleged that testatrix, prior to her death conveyed the property to her by grant deed, fact that defendant was testatrix' daughter-in-law, and occupied same house, did not necessarily create a confidential relationship, so as to shift burden to defendant to prove that execution and delivery of deed to her was free from fraud after bequest of property to plaintiff had been proved.

9. Pleading 🔑291(4)

Where defendant in quiet title action by affirmative defense alleged that property had been conveyed to her by grant deed by one now deceased, and plaintiff failed to file affidavit denying deed within ten days as required by law, plaintiff under her general denial could have introduced evidence to establish that deed had been stolen or procured by fraud, or any defense against it, except its genuineness and due execution. Code Civ.Proc. §§ 448, 462.

10. Deeds 🔑196

Fact that testatrix bequeathed property to plaintiff two years after she had delivered deed to the property to defendant, and that testatrix had when she executed will declared to her attorney that she owned the property, did not warrant inference of invalidity of the conveyance to defendant.

11. Pleading 🔑291(4)

In action to quiet title to realty, where plaintiff was claiming title as devisee and defendant by affirmative defense alleged that testatrix prior to her death conveyed the property to her by grant deed, plaintiff's failure to file affidavit denying deed within ten days as required by law constituted an admission by pleadings as to execution, genuineness and delivery of deed, and deed was not required to be put in evidence. Code Civ.Proc. § 448.

12. Pleading 🔑376
Trial 🔑35, 36

When party by his pleading concedes a fact or in open court declares or stipulates existence of a fact material to the cause of his adversary, no proof is thereafter required for a finding upon matter so confessed.

13. Pleading 🔑291(1)

The rule that geunineness and due execution of a writing relied upon as a defense is admitted by failure of plaintiff to file affidavit of denial as required by statute, is applicable even though plaintiff is not the author of the writing, and "due execution" of the instrument includes delivery. Code Civ.Proc. § 448.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Due Execution".

14. Evidence 🔑60, 64, 66

A presumption exists that in executing a writing, a party understands his act, that in delivering writing, he intended the natural consequences thereof, and that in conveying his property and in grantees' acceptance of deed, no fraud was perpetrated. Code Civ.Proc. § 1963, subds. 1, 4, 8, 12, 15, 16, 19, 20, 23, 27, 28, 32, 33, 39.

15. Pleading ⚷182, 291(4)

Where plaintiff in quiet title action was claiming title to property as devisee, and defendant by affirmative defense was alleging that testatrix prior to her death had conveyed property to her by grant deed, plaintiff was claiming to stand in shoes of testatrix as of moment of her death, and therefore was obliged to deny genuineness and due execution of deed to defendant, or by her silence admit its genuineness and due execution. Code Civ.Proc. § 448.

16. Trial ⚷377(2)

Where affidavit of plaintiff's counsel in support of motion to set aside order of submission and to reopen case to permit plaintiff to file affidavit denying genuineness and due execution and delivery of deed relied upon by defendant to establish her title to property in question, failed to disclose any fact that had been concealed from him prior to trial of case or that he could not have discovered prior to commencement of action by exercise of reasonable diligence, denial of the motion was not an abuse of discretion. Code Civ.Proc. § 448.

Potter, Potter & Rouse, by Bernard Potter, Jr., Los Angeles, for appellant.

Daily & Gallaudet, by Edward Gallaudet, Glendale, for respondent.

MOORE, Presiding Justice.

Appellant sued to quiet title to lot 27, tract 393 in Glendale on the ground that in her lifetime Mary V. C. Stratton, herein referred to as Mary or decedent, had by her last will and testament devised such realty to appellant and that the will had been duly admitted to probate. As an affirmative defense respondent alleged that decedent had by grant deed dated August 1, 1945, conveyed the lot to her and she pleaded the conveyance in haec verba. No affidavit denying the deed having been filed within 10 days as required by law (Code Civ.Proc. sec. 448), its genuineness and due execution were deemed admitted. The greater portion of two days having been consumed by the introduction of appellant's evidence, by colloquies of court and counsel and by arguments, the action was submitted on authorities to be filed. Six days thereafter appellant filed her motion to reopen the case and to set aside the order of submission and for an order permitting her to file an "affidavit denying the genuineness and due execution and delivery of that certain deed" contained in the affirmative defense. From the judgment denying her relief comes this appeal. A purported appeal from the order denying her motion to reopen the cause for the purpose of filing an affidavit under section 448, supra, is dismissed.

The entire proof adduced by appellant to substantiate her title is as follows: (1) Conveyance of lot 27 by Alma Watson to decedent and her husband, John W. Stratton, in 1922; (2) John's decease; (3) their son and his wife Julia entered into the Stratton home (lot 27) in 1931 where the son subsequently died; (4) August 1, 1945, Mary executed and delivered to attorney Cannon the grant deed pleaded in the answer; (5) August 21, 1947, attorney Emery visited Mary at her home and conversed with her with respect to the preparation of her will. He drew the will which contained the following clause: "I hereby give and devise to my sister Alice H. Butler, that certain parcel of improved real property, commonly known as 217 West Garfield Avenue, Glendale, California. If my sister fails to survive distribution to her of said devise, I give and devise the same to my sister, Eva H. Howell, now of St. Louis, Missouri." The attorney then testified that in the conversation Mary mentioned the parcel described in the quoted passage. "She said that she wanted the house where she then lived and the rest of her estate to go to her daughter-in-law Julia and if she was deceased, then to be equally divided between the sisters of the deceased, whom I have just named. I asked her if she had a deed to these properties and she said she did. I asked her if it was available for me to see. * * * She said that was not necessary because she owned the property. * * * She said, 'Well, my papers are in the safe deposit box and I am not able to go there; I don't want it disturbed, because I don't want Julia to know anything about this. I don't want her to know what disposition I am making of my property.'"

Following the testimony of Emery, appellant rested her case, but when the court reconvened at 2 p. m. she introduced the court files in the proceedings (1) terminating the tenancy of John W. Stratton; (2) terminating the tenancy of Fred W. Stratton, the son; and called and cross-examined respondent who established that when she and Fred moved into the Stratton home in 1931 Mary gave them the property and "said it would be our home and all." Julia continued to live there after Fred's decease in 1940; never had any conversation with Mary with regard to occupying the house. "She said it was ours * * * was bought for us in '22 and each time there was a letter they would always say there was a home if we would come and live there."

[1-3] Appellant complains that she was precluded from controverting the deed pleaded by respondent. A scrutiny of the transcript from the opening of the trial on November 3 to its adjournment on November 4 discloses no offer of competent proof that was rejected. Although appellant twice rested before submission on November 4, on her motion the court allowed her to reopen the case for other evidence or for the purpose of "putting on additional evidence with regard to title in plaintiff." The court repeatedly stated its desire to adjudicate the case on its merits and adjourned to the following day in order to enable appellant to offer further testimony. However, on that day no evidence was presented except the deed of Watson to Stratton. The claim that the court sustained an objection to the question propounded to Emery whether decedent mentioned lot 27 is refuted by the court's declaration: "If that is the purpose * * * I will overrule the objection." To the complaint that she was not permitted on her direct examination to introduce evidence as to the deed pleaded by respondent, there are two answers: it is the prevailing practice to meet proof of affirmative defenses after defendant has rested. Also, it is the duty of the court to determine the order of proof. Turner v. Southern Pacific Co., 142 Cal. 580, 582, 76 P. 384.

[4] Objection to the question asked Julia as to whether she resided in the Stratton home by permission of Mary was correctly sustained as calling for a conclusion. The inquiry of Julia as to whether she "ever had possession of a deed prior to August 1, 1945" was immaterial in view of the evidence that she commenced her term of residence there many years prior to that time on the invitation of decedent, and the deed of decedent was given to her about the time of its date. The court was generous in assisting appellant to make proof of her claims by discussing appellant's offers of evidence and by explaining the fallacies of some of her contentions.

[5] It is contended that a prima facie case was established by the specific bequest of lot 27 to appellant and that title vested in appellant upon the decease of Mary. It is the law that title of a decedent's property vests in the devisees and legatees upon the death of the testator subject to administration (Mears v. Jeffry, 80 Cal.App.2d 610, 617, 182 P.2d 294) but if one who contends that he is the sole devisee admits in the same breath that the testator had conveyed the property to another at a time antedating the will, of what avail is the bequest? The fact that the testator and the grantor are the same person adds no such virtue to a devise as will render it paramount to a prior grant. The fact that there was never a decree of distribution in the estate of decedent is of no advantage to appellant; on the contrary, it renders hollow the bequest. Such a decree signifies only that the bequest to a devisee has passed to the distributee free of all liens of creditors and of expenses of administration.

[6] The fact that the will of decedent was admitted to probate proves nothing with respect to the title of lot 27 at the time of decedent's death. It is a fact of frequent occurrence that the author of a will has already specifically devised his properties to other devisees or that he sub-

sequently alienates the same by will, deed or mortgage. The only significance of the probate of Mrs. Stratton's will is that the devisees named therein stood with respect to her estate in the same position she occupied at death. Having nothing at her death, she left nothing to them.

[7] Appellant argues that since Mary exercised ownership of the property, held the record title thereto and declared to her attorney that she owned it—these facts give rise to the presumption that she did in fact own it, and the court therefore erred in not quieting title in her. She asserts that the manner of testatrix' dealing with the property is inconsistent with the thesis of the delivery of a deed to respondent. Such conclusion does not follow. She was an ill woman at the time of executing her will. The more rational explanation of her bequest is that probably she had then forgotten recent events while her mind was dwelling on those dear to her in yesteryears. Or she may have nebulously conceived that since she had already conveyed the lot to Julia, she would provide for it to go to her sisters should respondent predecease her. This thesis is justified by the quoted language of the will. Her demonstrations of ownership of lot 27 in August, 1947, were no more emphatic than at the time of her grant to respondent in 1945.

[8] It is contended that since a confidential relationship existed between decedent and her daughter-in-law, after the bequest of lot 27 to appellant had been proved, the burden shifted to Julia to prove that the execution and delivery of the deed to herself was regular and free from fraud, citing Sparks v. Mendoza, 83 Cal. App.2d 511, 514, 189 P.2d 43. The facts that she was a daughter-in-law and occupied the same house do not necessarily create a confidential relationship. In Sparks v. Mendoza the confidential relationship was established, the deed was without consideration and the grantor had no independent legal advice. None of these factors was established with reference to Mary Stratton. It is a more logical presumption that she sought and received advice before executing the deed in favor of Julia which she knew could not be recalled or nullified by herself.

[9] Appellant argues that because the answer is deemed to be controverted (Code Civ.Proc. sec. 462) the "plaintiff is not precluded from introducing evidence in avoidance of the deed." It is undeniable that appellant might, under her general denial, have introduced evidence to establish that the deed had been stolen or procured by fraud, or any defense against it, except its genuineness and due execution. Moore v. Copp, 119 Cal. 429, 432, 51 P. 630; Miller v. McLaglen, 82 Cal.App.2d 219, 225, 186 P.2d 48. As indicated above, the court indulgently encouraged appellant to present any proof at her command so that a judgment might be had on "the merits."

[10-12] Appellant asserts also that she proved without contradiction "that decedent did not comprehend the legal effect of the deed." If such proof was made it was not reported and appellant made no effort to correct the transcript. The fact that she bequeathed it two years after she had delivered the deed to respondent may occasion other inferences which do not derogate from the validity of the conveyance. That she declared to her attorney that she owned lot 27 was no more than the conclusion of the decedent who was not available for cross-examination as to prior alienation. It was not essential for the deed to be in evidence. Its execution, genuineness and delivery were admitted by the pleadings. The rules of pleading and practice do not require supererogation. When a party by his pleading concedes a fact or in open court declares or stipulates the existence of a fact material to the cause of his adversary no proof is thereafter required for a finding upon the matter so confessed. People v. Hooper, 16 Cal.App.2d 704, 707, 61 P.2d 370; Southern Pacific Company v. Grangers' Business Association, 115 Cal.App. 256, 261, 1 P.2d 477; Cockrill v. Clyma, 98 Cal. 123, 125, 32 P. 888.

[13-15] Appellant contends that section 448, Code Civil Procedure, is not binding upon a plaintiff who was not a party to

the writing and attempts to distinguish Stoneman v. Fritz, 34 Cal.App.2d 26, 92 P.2d 1035, which, she says, has never been approved by the Supreme Court. There is no legal support or valid reason for such contention. The Stoneman case positively affirms the language of the statute, includes *delivery* in "due execution" of the instrument and holds that the rule is applicable even though the plaintiff is not the author of the writing. In deriving such interpretation the court was aided by the presumptions that in executing a writing a party understands his act; that in delivering it he intended the natural consequences thereof; that in conveying his property and in respondent's acceptance of the deed no fraud was perpetrated. Code Civ.Proc. sec. 1963, subds. 1, 4, 8, 12, 15, 16, 19, 20, 23, 27, 28, 32 33 39. The Stoneman case is supported by prior decisions of the same import. Bank of America Nat. Trust & Savings Ass'n v. Richardson, 29 Cal.App.2d 554, 556, 85 P.2d 139; Cordano v. Wright, 159 Cal. 610, 615, 115 P. 227, Ann.Cas. 1912C, 1044. It was followed in Oswald v. Northrop Aircraft Inc., 62 Cal.App.2d 824, 827, 145 P.2d 635. Despite the clear and forceful language of these authorities appellant insists that the statement in City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87, that section 448 is "not binding on a party to the action who was not a party to the written instrument pleaded in answer" is authority only for the general statement that failure to deny due execution of an instrument within ten days is tantamount to an admission thereof. The Watterson decision referred to a situation in which the contract in question had been executed by one defendant to another and the plaintiff was in no sense a privy thereto. In the instant action appellant claims to stand in the shoes of decedent as of the moment of her death and therefore was obliged to deny the genuineness and due execution of the deed or by her silence admit its genuineness and due execution.

[16] While the order denying appellant's motion to set aside the order of submission and to re-open the case is not appealable, the legality of such order has been duly considered as a part of the appeal from the judgment. The transcript of the proceedings reveals nothing that would indicate an abuse of discretion in denying such motion. The complaint was filed May 17, 1948. The answer containing decedent's deed was filed June 24, 1948. A stipulation to an amendment to the complaint by interlineation was filed October 26, 1948. The trial was commenced one week later. Although appellant's counsel addressed the court for 15 minutes he offered no evidence but the will, the file in the estate of decedent and the testimony of the attorney who, having interviewed her and prepared the will, gave in evidence the statements made at that time to him by Mary. When both parties rested at noon, adjournment was taken until 2 p. m. for argument. At the latter hour appellant moved the court "to reopen the case for the purpose of putting on additional evidence with regard to title in the plaintiff." The motion having been granted, the several court files heretofore mentioned were introduced and respondent was called for cross-examination. During the argument and colloquy with the court for about two hours, appellant finally offered the deed from Watson to the Strattons. Adjournment was taken with the understanding that briefs would be filed "10–10 and 5." Six days later appellant filed her motion to reopen and to be allowed to file a denial of due execution of the deed which was decided adversely to appellant on November 24. The affidavits in support of the motion presented nothing new except averments of statements by the the notary whose certificate is attached to decedent's deed. Such matters were immaterial to the question of the due execution of the instrument attached to respondent's answer. There was no offer to prove fraud or undue influence upon decedent by respondent in procuring delivery of the deed. Appellant filed her "Points and Authorities" in support of her motion whereby she pleaded "in the interest of justice" to be relieved from her default in failing to file the affidavit denying due execution of the deed because "the omission was manifestly the result of excusable and understandable

mistake of law and excusable inadvertence and neglect." The affidavit of appellant's counsel discloses no fact that had been concealed from him prior to the trial of the case and none that he could not have discovered prior to commencement of the action by the exercise of reasonable diligence. There was no abuse of discretion in denying the motion.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

95 Cal.App.2d 64

DRANEY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 7727.

District Court of Appeal, Third District, California.
Dec. 12, 1949.

Petition for writ of review by Theron W. Draney against the Industrial Accident Commission of the State of California, W. L. English, employer, and Industrial Indemnity Company, insurer, to review.

An award of the Commission which found that petitioner had suffered an industrial injury and awarded compensation but denied any allowance for self incurred medical expenses.

The District Court of Appeal, Adams, P. J., held that the employer and insurer failed to furnish employee with necessary treatments and were liable for the reasonable expense incurred by him in securing it, and annulled the award with direction.

Workmen's compensation 🔑976

Where injured employee reported to employer's insurance carrier's physician for treatment and physician reported to employer and insurer that further treatment was needed, and employee was instructed to report to another physician but not told whom to see, and employee visited physician of his own selection and had necessary operation performed at his own expense, employer and insurer neglected and failed to furnish employee with necessary medical treatment and were liable for reasonable expense incurred by employee in securing it. Labor Code, § 4600.

John C. Bartlett, Reno, Nevada. Leonard, Hanna & Brophy, San Francisco, for petitioner.

T. Groezinger, Alfred C. Skaife, San Francisco, for Ind. Accident Comm.

ADAMS, Presiding Justice.

This is a petition for review of a portion of a decision by respondent Industrial Accident Commission in which petitioner was found to have suffered an industrial injury, and awarded compensation, but was denied any allowance for self-incurred medical expenses. He here contends that such expenses should have been allowed.

At the time of the injury Draney was employed by W. L. English, as a general laborer, and was, on the 30th day of August, 1948, engaged in loading rocks into a truck. About 11 A.M. he suffered pain in his back, but continued working that day; and he continued in English's employ, doing lighter work, until September 10th, though his pain grew steadily worse. On September 5th he went to the Tahoe Medical Center to which his employer's employees had been instructed to report in case of injury, and Dr. Weyand, English's insurance carrier's physician, taped his back, advised him to use bed boards, and to limit his activity. On September 6th Dr. Weyand made a report of Draney's injury to the Industrial Indemnity Company, in which he stated: "This clinic is closing and patient has been instructed to report to another M. D. in one week." He also reported that further treatment was needed for a period unknown. This report was received by the insurance carrier in Sacramento on September 8th. It then mailed to Draney a form of report to be made out by him, and it also wrote requesting him to contact it in Sacramento. Draney was not instructed by Dr. Weyand nor by the insurance carrier nor by English to report to another specified doctor; and as his pain increased he went to Dr. Walter L. White in Reno on September 28th, who treated him by manipulation, deep heat and analgesics. Draney visited Dr. White again on October 2nd, but as the treatments gave only temporary relief he went to Dr. Lynn B. Gerow, M.D., on October 4th. Dr. Gerow told him he had probably slipped an intervertebral disc, and that an operation might be necessary. Hoping to avoid such operation Draney then went to San Francisco and had two chiropractic treatments by a Dr. Hunt, which gave no relief. Dr. Hunt referred him to Dr. Mack, a specialist in Reno, and on October 13th he returned to Dr. Gerow who with Dr. Mack made a study of his back and advised an operation immediately. Such operation was performed the following morning and revealed severe herniation of the lumbosacral disc which was removed. The patient was hospitalized for fourteen days and incurred an expense of about $600. He then took a job as caretaker of a hotel, involving very light work.

The testimony shows that between August 30th and September 10th Draney told English about his injury, and that he had been to see Dr. Weyand; also that he told him about necessary surgery ten days or two weeks before the operation; but he did not communicate further with him until after the surgery. He did not make any particular demand upon English for medical treatment; it is admitted, however, that none was ever offered him, except that there was the general understanding that injured employees were to report to the Tahoe Medical Center. When that closed it is obvious that Draney was left without instruction as to where to go for medical care and treatment.

The question before us seems to be whether, under such circumstances, the injured employee was obligated to seek such instruction from his employer, or whether the burden was upon the employer to furnish medical assistance.

Section 4600 of the Labor Code provides: "Medical, surgical, and hospital treatment, including nursing, medicines and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

In Myers v. Industrial Accident Commission, 191 Cal. 673, 679-680, 218 P. 11, 13, the court said: "It is plain from a reading of the Compensation Act that it is the first duty of an employer to furnish medical aid and hospital service to an injured employee, and not merely to reimburse the latter after the service has been procured elsewhere. * * * Consent of an employer, either affirmatively given, or inferred from his inaction, to the employee to procure his own treatment, renders the employer liable for the reasonable expenses thus incurred." Bucyrus Co. v. Reisinger, 77 Ind.App. 361, 133 N.E. 516, was cited in that case. Its facts are comparable to those in the instant case. There the employer complained of the failure of the injured party to return to its doctor for further treatment, and insisted that there was no evidence that it knew, or had any notice of the serious injury to the employee that manifested itself about 50 days after the injury; that its notice and knowledge of the original injury was not sufficient. The court quoted from the applicable portion of the state statute, which is similar to ours, and said, 133 N.E. at page 517:

> "The requirement of this statute implies something more than passive willingness on the part of an employer to respond to a demand or request for medical aid. It implies some degree of active effort to bring to the injured employe the required humanitarian relief. A person injured by an accident is presumed to be under more or less physical disability, and not in a normal condition so as to be able to look out for himself and his needs. This being true, it becomes the duty of an employer

having knowledge that one of his employes has been injured by an accident arising out of and in the course of his employment to be more than passive in his efforts to furnish the medical aid prescribed and required by the statute. The statute requiring the employer to furnish medical services is mandatory in form. Having had knowledge of the accident and injury, and knowing that appellee needed further treatment, and having failed to make any effort to see that he got the necessary medical care, appellant is in no position to complain of the fact that it was not notified when appellee's condition became serious as the result of the accident and injury of which it had actual knowledge. The employer here had notice of the injury. The doctor to whom it sent appellee for treatment knew and testified that further treatment was necessary. It therefore had an opportunity to take the proper steps to furnish medical aid to the injured employe, and with such knowledge as is disclosed by the evidence in this case, having failed to follow up appellee's injury, it is in no position to complain of the failure to give it notice that the injury was growing worse. Appellant knew that appellee's injury did not respond to first aid treatment. It sent him to a physician for treatment, and knew that he needed further treatment. It knew he quit work, and, having failed to do more than show a passive willingness to comply with the mandatory requirement of the statute to furnish medical aid, appellant cannot now be heard to complain that it had no notice of the serious effect of the injury which nearly resulted in his death, and which made him a cripple for life. If appellant was prejudiced because of its failure to have notice of appellee's serious illness which the Board found resulted from the accident and injury to appellee, the fault can be traced to its failure to follow up and treat an injury that it knew needed further treatment."

In 1 Campbell on Workmen's Compensation, section 739, page 656, the text reads:

"When the employer has had notice of the fact of an industrial injury and notice of the need for treatment, with attendant opportunity to furnish such medical treatment, but fails to tender such treatment promptly, * * * the employee is entitled to obtain the same from physicians of his own selection at the employer's expense."

In 1 Honnold on Workmen's Compensation, section 195, page 699, the author cites as authority Denedy v. Panama-Pacific International Exposition Co., 1 Cal. I.A.C. dec. 109, and says:

"The employer must, upon the happening of an accident, at once instruct the employe regarding the medical and surgical treatment to be furnished. He must specifically instruct what to do and to whom to report. If the employe is not so instructed, and secures treatment on his own behalf, the employer is liable for the reasonable value of such treatment, even though he was ready and desirous of furnishing medical aid according to his own plans."

The decision of the Commission in the Denedy case cited by Honnold makes it impossible to conceive how it could deny the self-incurred medical expenses to Draney. In that decision the Commission said:

"In this case the physician of the defendant who gave the applicant first aid allowed him to go away without giving him any instructions to return or telling him that provision would be made for his treatment, and it was not until three days afterwards that the applicant was informed of his duties in the premises. By that time he had incurred certain reasonable expenses for treatment and had secured the services of Dr. John Lagan to treat him and treatments had been given him. It was not incumbent upon applicant to change his physician after thus having made proper arrangements for treatment. Therefore, in this case, an allowance is made for the medical and surgical treatment. * * *"

In the instant case English, the employer, had notice of Draney's injury; also, his insurance carrier was notified by Dr. Weyand of the injury, and that Draney was in need of further treatment and had been told to report to another doctor. Neither the employer nor the insurance carrier denied knowledge, nor did either advise Draney as to what physician he should see, or where he should go for the further treatment needed.

There is no testimony in the record by or on behalf of the respondents, and no testimony that they lacked knowledge of Draney's need for further medical aid, nor is it contended that the operation which was performed for him was not necessary, or that it was not beneficial, or that the expenses incurred were not reasonable. We think that the record shows that the respondents neglected and failed to furnish Draney with the necessary treatment, and that they should be held liable for the reasonable expense incurred by him in securing it.

The award, in so far as it denied Draney recovery for his self-incurred medical expenses, is annulled, and it is ordered that the award of the Commission be modified in accordance with the views herein expressed.

PEEK, and THOMPSON, JJ., concur.

95 Cal.App.2d 6

D'AMICO et al. v. RIEDEL et al.

Civ. 17059.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1949.

Hearing Denied Feb. 2, 1950.

Gemma D'Amico and Vito D'Amico sued John M. Riedel and Blanche M. Riedel in unlawful detainer to recover rent, damages, attorney's fees, restitution of the leased premises and forfeiture of the lease.

The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment for the plaintiffs, and defendants appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment and held that the trial court properly refused to permit defendants to raise the issues of fraud, rescission and invalidity of the lease as defenses.

1. Forcible entry and detainer 🔑12(1)

Generally, neither a counterclaim nor cross-complaint is permissible in an action in unlawful detainer.

2. Landlord and tenant 🔑290(5)

Rule that a counterclaim or cross-complaint is not permissible in an action in unlawful detainer is subject to exception that either may be maintained where it appears that prior to joining of issues of fact, tenant has voluntarily surrendered possession of premises and issue of possession has thus been removed from the case.

3. Landlord and tenant 🔑298(2)

Where lessees were not in occupancy of premises when lease was executed but took possession under lease, lessees would not be permitted to set up fraud as a defense to claim for rental and attorneys' fees provided for in lease in unlawful detainer action.

4. Forcible entry and detainer 🔑6(1)

An unlawful detainer action is not on contract but for recovery of posssession of premises and incidentally for damages occasioned by unlawful detainer.

5. Landlord and tenant 🔑201

Agreed rent is evidence of rental value.

6. Landlord and tenant 🔑118(3)

Where lessees were not in occupancy of premises when lease was executed but took possession under lease, fact that lessees brought an action for rescission of lease on ground of fraud did not make lease void so as to make lessees tenants at will.

7. Landlord and tenant 🔑291(17)

Where lease provided that lessees would pay reasonable attorneys' fees to lessors in event it became necessary to bring an action under the lease, lessors were entitled to recover attorneys' fees in accordance with provisions of lease in unlawful detainer action.

8. Landlord and tenant 🔑291(18)

Where lease provided that lessees were to pay reasonable attorney's fees in event it became necessary to bring an action under lease, question as to reasonableness of fee was a question for trial court in unlawful detainer action.

Glenn R. Watson, Los Angeles, for appellants.

Miller, Beck & Stillwell, San Fernando, for respondents.

WILSON, Justice.

From a judgment in favor of plaintiffs for rent, damages, attorney's fees, restitution of the premises and forfeiture of the lease in an action in unlawful detainer, defendants appeal.

The undisputed facts are as follows: In March, 1948 plaintiffs leased a residence and motel to defendants under a written lease agreement; the lease provided for rental at the rate of $500 per month and reasonable attorney's fees should it become necessary to bring an action under the lease. Defendants failed to pay the rent instalments due on June 1, 1948, and July 1, 1948, whereupon plaintiffs served upon them a three-day notice to pay rent or quit followed four days later by the filing of this action.

Defendants by their answer admitted they were still in possession of the premises and that they refused to surrender possession thereof but alleged as affirmative defenses that the lease was obtained through fraud; that in June, 1948, defendants rescinded the lease on account of such fraud and tendered possession of the premises to plaintiffs upon the condition that plaintiffs restore to defendants the value received by them by reason of such fraud; that prior to the filing of this action defendants had filed an action for rescission against plaintiffs upon the grounds of fraud and the action was still pending; that defendants were tenants at will and had not been served with a thirty-day notice.

Upon motion of plaintiffs, all the above mentioned defensive matter was stricken from the answer. At the time of trial defendants moved to restore the stricken defenses which motion was denied.

The sole question raised by this appeal is whether the court erred in refusing to permit defendants to raise the issues of fraud, rescission and invalidity of the lease as defenses.

It is defendants' contention that (1) fraud may be shown as a defense in an unlawful detainer action, (2) the lease having been procured by fraud the terms thereof are unenforceable, and (3) a tenant who rescinds a lease procured by fraud becomes a tenant at will.

[1, 2] The cases cited by defendants do not sustain their contentions. It is the general rule that neither a counterclaim nor cross-complaint is permissible in an action in unlawful detainer. The reason for the rule is that since the action is a summary proceeding designed especially for the purpose of a speedy means of recovering possession of real property, tenants withholding the premises in violation of the covenants of their lease cannot through means of a cross-complaint or counterclaim frustrate the extraordinary remedy provided by the statute. Smith v. Whyers, 64 Cal.App. 193, 194, 221 P. 387; Servais v. Klein, 112 Cal.App. 26, 33-34, 296 P. 123; Heller v. Melliday, 60 Cal.App.2d 689, 696, 141 P.2d 447. This rule, however, is subject to the exception that a counterclaim or cross-complaint may be maintained where it appears that prior to the joining of the issues of fact the tenant has voluntarily surrendered possession of the premises and the issue of possession is thus removed from the case. Heller v. Melliday, supra; Servais v. Klein, supra. In the Smith case [64 Cal.App. 193, 221 P. 388] the court concedes that a tenant who while in possession is fraudulently induced to enter into a lease may set up the fraud in an action in unlawful detainer but states "This rule does not apply to a case where the tenant was not in possession at the time the lease was executed, but where her only right to possession is the lease which she claims to be void by reason of fraud in its execution." The court further points out that "the very purpose of the statute would be defeated if a defendant who claimed that she entered under a void lease through the fraud of the plaintiff should be permitted to remain in possession under the lease while the validity of the lease was being litigated."

In the instant case defendants were not in occupancy of the premises when the lease was executed but took possession under the lease. They retained possession throughout the trial. It was not until the commencement of the trial that they offered to surrender the premises, leaving only the issue of monetary recovery. Their prior offer to surrender was conditioned upon the return to them of the moneys which they had paid to plaintiffs. Had the latter accepted such an offer they would in effect have admitted the fraud.

[3-5] Defendants' assertion that they should have been permitted to set up the fraud as a defense to the claim for rental and attorneys' fees provided for in the lease is without merit. An unlawful detainer action is not upon contract but for recovery of possession of the premises and incidentally for the damages occasioned by the unlawful detainer. The court may, pursuant to section 1174 of the Code of Civil Procedure, assess damages and find the amount of any rent due. Ordinarily the agreed rent is evidence of the rental value. Harris v. Bissell, 54 Cal.App. 307, 312, 202 P. 453.

Defendants admit that on March 1, 1948, they went into possession of the premises under a written lease and that they have "ever since and still continue to occupy and hold possession of said premises as tenants of plaintiffs."

[6] The fact that defendants brought an action for rescission of the lease does not, as they contend, make it either void or invalid, nor does it make them tenants at will. Plaintiffs did not accept their offer of rescission and defendants remained in possession.

[7, 8] Finally, defendants contend that since there is no statutory provision for attorneys' fees in an unlawful detainer action such fees should not have been allowed. It is admitted, as alleged in the complaint, that under the terms of the lease defendants agreed to pay reasonable attorney's fees to plaintiffs in the event it became necessary for the latter to bring an action under the lease. By this action and as incidental to recovery of possession plaintiffs sought forfeiture of the lease for breach of the covenant to pay rent. Since the claim for attorney's fees is in accordance with an express provision of the lease, plaintiffs are entitled to judgment therefor. Olcovich v. Deremberg, 27 Cal.App. 194, 196, 149 P. 375; William Wilson Co. v. Trainor, 27 Cal.App. 43, 45, 148 P. 954. The question as to the reasonableness of the fee is for the trial court to determine and defendants have not questioned the amount of the fee awarded.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 950

CUSHING v. CUSHING.

Civ. 17023.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1949.

Action by Georgette Jeanne Cushing against Harry Cook Cushing for divorce.

From an order of the Superior Court of Los Angeles County, Wm. S. Baird, J., denying the defendant's motion to set aside an order directing defendant to pay $5,000 to his wife's attorney as attorney's fees, pendente lite, the defendant appealed.

The District Court of Appeal, White, P. J., held that there was no abuse of discretion, and affirmed the order.

1. Appeal and error ⚷957(1)

An order granting or denying relief from judgment taken by mistake will not be set aside on appeal unless abuse of discretion clearly appears. Code Civ.Proc. § 473.

2. Appeal and error ⚷957(1)

It is only in extreme cases that an appellate court will interfere with the action of the trial court in refusing or granting an order for relief from judgment taken by mistake. Code Civ.Proc. § 473.

3. Appeal and error ⚷957(1)
Judgment ⚷139

An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and the action of that court will not be set aside on appeal unless an abuse of discretion clearly appears. Code Civ.Proc. § 473.

4. Appeal and error ⚷935(1)

All presumptions will be indulged in favor of the court's action in granting or refusing relief from judgment taken by mistake and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order. Code Civ.Proc. § 473.

5. Divorce ⚷229

Where order directing the defendant in divorce proceeding to pay $5,000 to his wife's attorney as attorney's fees pendente lite was made on May 3, 1948, and no appeal was taken therefrom, writ of execution was issued in return unsatisfied on July 30, 1948, and an order for appearance of judgment debtor was issued on September 8, 1948, and motion to set aside the order was denied on September 28, 1948, there was no abuse of discretion in denying a second motion on October 22, 1948, to set aside the order on ground of mistake, inadvertance, surprise and excusable neglect. Code Civ.Proc. § 473.

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Oscar Richard Cummins, Beverly Hills, for appellant.

Judd Downing, Beverly Hills, for respondent.

WHITE, Presiding Justice.

This is an appeal by defendant from an order denying his motion, made under section 473 of the Code of Civil Procedure, to set aside an order, entered in a divorce action, directing him to pay $5,000 to his wife's attorney as attorney's fees pendente lite.

The order for payment of attorney's fees was made at the hearing of an order to show cause on May 3, 1948, and was entered on the minutes of the court on May 12, 1948. Defendant was present with his counsel when the order was announced. No appeal was taken. On July 30, 1948, a writ of execution was issued and returned unsatisfied. On September 8, 1948, an order for appearance of judgment debtor was issued requiring the appearance of defendant on September 22, 1948. On September 21, 1948, defendant through his counsel filed a notice of motion to vacate the order awarding counsel fees. This motion was heard and denied on September 28, 1948, by Judge Elmer D. Doyle. On October 22, 1948, defendant filed a motion to set aside the order upon the grounds of "mistake, inadvertence, surprise and excusable neglect on the part of defendant and his counsel." This motion was denied by Judge Wm. S. Baird on October 29, 1948. It is from the denial of this motion that the present appeal is prosecuted.

Appellant's points on appeal, summarized, are that the facts justified granting relief on the ground of mistake, inadvertence, surprise and excusable neglect; that appellant acted diligently under the circumstances; that he has a good defense on the merits, and counsel for respondent would receive an "unearned increment" if the order be not set aside; and as a consequence, the lower court abused its discretion in denying the motion.

In her affidavit for an order to show cause the wife stated that her husband's net worth was in excess of $1,500,000 and his monthly income in excess of $7,500. The husband alleged in his "husband's questionnaire" that his net worth was "nothing"; that his income for the previous year was $20,000 and was "abnormally high" through receipt of dividends due to the "hanging over of war production". At the time the court made its order for payment of the attorney's fee, it was stipulated that no default judgment would be taken against the husband during the pendency of negotiations for a property settlement agreement. These negotiations failed.

In his affidavit in support of his motion under section 473 of the Code of Civil Procedure, defendant husband stated, in part as follows:

"That it was the understanding of affiant that the said sum was awarded for future services for prosecution of a divorce action of plaintiff against defendant.

"That since that time, plaintiff and defendant have become reconciled and plaintiff has condoned former acts of defendant, and that plaintiff has informed defendant that plaintiff has instructed her attorney to dismiss the divorce action now pending between the parties. That plaintiff informed defendant that she had so instructed her attorney prior to the time that the judgment for attorney's fees pendente lite became final.

"That as a result thereof, no further services will be required to be performed by plaintiff's attorney, except to file a dismissal, * * *.

"That affiant is informed that the judgment awarding plaintiff's attorney fees pendente lite, has become final. That affiant did not know that plaintiff's counsel could secure a judgment for fees for future services even though the said services were not to be performed, and failed to notify his counsel of the reconciliation between himself and the plaintiff, and of her instructions to her attorney to dismiss the divorce action. * * *"

One of the attorneys for defendant also made a supporting affidavit, wherein he stated that he was recently informed that there had been a reconciliation, but that this was not until long after the judgment awarding attorney fees had become final.

In opposition to the motion Mr. Downing, the wife's attorney, filed an affidavit, in which he set forth the following facts:

That after the making of the order for payment of fees, it was stipulated that no default would be taken against the husband during the pendency of negotiations for a property settlement. These negotiations continued into the month of July, 1948, and consisted of numerous telephone conversations and conferences with appellant's attorneys. In the process of these negotiations, respondent's attorney prepared and submitted to appellant's attorneys for signature two separate and complete property settlement agreements. The last agreement, which was drawn in accordance with the desires of both parties and their attorneys, was submitted on or about June 20, 1948, to appellant's attorneys. On numerous occasions subsequent to that date, respondent's attorney attempted to ascertain when said agreement would be signed by appellant, but was unable to contact appellant's attorneys by phone. Finally on the 14th day of July, 1948, more than sixty days having elapsed since the order for payment of attorney's fees was made, respondent's attorney wrote to appellant's attorneys, advising them that unless payment were made in two days an order to show cause would be issued. Throughout this period the wife was insistent that the divorce be proceeded with. On July 30, 1948, respondent's attorney secured the issuance of a writ of execution and caused the same to be served upon various parties, including one of appellant's attorneys. The writ was returned unsatisfied.

About August 1, 1948, the wife informed Attorney Downing that she was undecided about continuing the divorce action, that she might desire to bring an action in Nevada or in her state of previous residence, Michigan. Attorney Downing stated that he would hold the matter in abeyance until he received further instructions.

On September 8, 1948, Attorney Downing secured an order for the appearance of appellant as a judgment debtor, the order being returnable on September 22. On September 21 appellant's attorneys filed a notice of motion to vacate the order for attorney's fees and secured a continuance of the hearing on the judgment debtor proceedings. The motion to vacate was denied on September 28, appellant was examined as a judgment debtor on October 20, and an order to show cause in re contempt was served on him returnable November 17.

On October 20, 1948, Attorney Downing received in the mail a letter from the wife requesting him to dismiss the action. This letter was not dated, but was delivered in an envelope postmarked New York City, October 18. On October 22, Attorney Downing forwarded to the wife a letter inclosing two copies of a request for dismissal of the action for her signature. This letter was returned unopened and undelivered on November 6. On November 8 Attorney Downing learned that Mrs. Cushing was in Paris, France. He forwarded the dismissals to her in Paris, received them back, executed, on December 3, and thereupon filed them.

The motion here under consideration was filed October 22, 1948.

At the outset, it should be noted that we are not here concerned with the merits of the original order awarding attorney's fees, inasmuch as no appeal was taken therefrom. Nor is there before us the question of whether the order should have been modified—that is, reduced to an amount supposedly commensurate with the services actually rendered. The sole question presented is whether the superior court abused its discretion in denying a motion to set aside the judgment entered against appellant as a result of the foregoing order entered May 18, 1948, awarding attorney's fees pendente lite, on the ground that the order was taken against appellant by reason of "mistake, inadvertence, surprise or excusable neglect" on the part of appellant or his counsel. It must be held that no such abuse of discretion is shown.

[1-4] An order granting or denying relief under section 473 of the Code of Civil Procedure will not be set aside on appeal unless an abuse of discretion clearly appears. As is said in Hecq v. Conner, 203 Cal. 504, 509, 510, 265 P. 180, 183: "It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. 'The law governing this class of cases is so well settled, and has been so often declared in the decisions of this court, that we may dispense with the citation of authority. An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and the action of that court will not be set aside on appeal unless an abuse of discretion clearly appears. * * *' (Citations.) 'The rule is equally applicable whether the motion is granted or refused, * * * All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order.' Moore v. Thompson, 138 Cal. 23, 26, 70 P. 930, 932."

While it is true that because of the remedial character of section 473 of the Code of Civil Procedure and the policy of applying it liberally to the end that an opportunity to present a substantial defense may be afforded, courts will listen more readily to an appeal from an order denying relief than to one granting the same, nevertheless, there has been no relaxation of or departure from the cardinal rule that in either event there must be shown a clear abuse of discretion before an appellate tribunal will disturb the order. And as heretofore noted, the burden of showing such abuse of discretion rests on appellant.

[5] The trial court here was justified in concluding that the showing made by appellant was insufficient. The order requiring appellant to pay attorney fees and costs within sixty days was announced in open court in the presence of appellant and his counsel, on May 3, 1948. Except to ignore the order and the directions therein contained, both appellant and his counsel, for a period of nearly six months after the entry of the order, did nothing and raised no claim that it was taken against them through mistake, surprise or excusable neglect. Their failure to take any action during this long period is a circumstance that must necessarily weigh heavily against them in their proceeding under section 473 of the Code of Civil Procedure. Upon this appeal we must give full credence to the affidavit in opposition to the motion, from which it appears that negotiations for a property settlement continued into the month of July; that about August 1 the wife informed the attorney that she was undecided about continuing the action and might bring suit in Nevada or Michigan, whereupon her attorney stated that he would hold the matter in abeyance. It was not until October 20 that he received a letter from the wife, postmarked New York,

requesting him to dismiss the action. The affidavit of appellant does not state when the alleged reconciliation took place, but merely that it was "since" the order for attorney fees was made. No attempt was made by affidavit to show that Attorney Downing had not actually rendered any services, nor was it stated what services he had rendered, nor was there any contradiction of his affidavit showing the extent of services rendered in connection with the negotiations for a property settlement.

Appellant stated in his affidavit that his wife told him she had instructed her attorney to dismiss the action "prior to the time that the judgment for attorney's fees pendente lite became final." This was contradicted by the affidavit of the wife's attorney, who stated that the first intimation of a reconciliation came when he received the letter postmarked October 18. Although appellant stated that he "did not know that plaintiff's counsel could secure a judgment for fees for future services even though the said services were not to be performed, and failed to notify his counsel of the reconciliation * * *," appellant does not deny that he heard and understood the terms of the original order which required payment within sixty days after May 3, 1948. During that period, as heretofore noted, nothing was done toward payment and, according to the affidavit of the wife's attorney, at the end of that time there was no indication of a reconciliation.

It is to be remembered that all that this court and the superior court have before it are the affidavits in support of the motion and the counter-affidavit of Attorney Downing. It is suggested in the briefs on appeal that the delay of appellant in advising his counsel of the reconciliation was excusable because he was in New York and away from his California counsel a great part of the time. No showing to that effect was made. It is further suggested by appellant that it is contrary to the ends of justice to punish him for doing the very thing society favors, accomplishing a reconciliation. However, the suggestion is answered in respondent's brief by the undenied statement that pending this appeal appellant filed another divorce action in the superior court and respondent wife had secured a Mexican divorce. Moreover, it appears that in November, 1948, respondent wife was in Paris and appellant in California. In her letter of October 18 the wife asserted to her attorney that she had frequently informed him of her wish to discontinue the divorce action, yet the attorney averred that this was the first intimation he had to that effect. No earlier written communications by the wife to her attorney were disclosed.

We do not wish to be understood as holding that in all cases wherein a reconciliation is effected the court is without power to modify its orders in re attorney fees pendente lite or to grant relief under section 473 of the Code of Civil Procedure, which would, in proper cases, enable the court to modify such orders. What we here hold is that appellant in the instant case has not met the burden cast upon him to make a clear and convincing showing of abuse of discretion by the trial court.

From a review of the entire record in the instant proceeding, we do not find any substantial showing that the judgment or order from which appellant seeks to be relieved was the result of a mistake or inadvertence which reasonable care could not have avoided, a surprise which reasonable caution could not have prevented, or a neglect which reasonable prudence could not have anticipated. We cannot, therefore, disturb the action of the court below.

For the foregoing reasons, the order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

94 Cal.App.2d 921

BRADFORD v. BRADFORD.

No. 14094.

District Court of Appeal, First District,
Division 1, California.
Dec. 6, 1949.

Action for divorce by Mauvia Bradford against Lowell Bradford, wherein a decree was entered for plaintiff.

From subsequent orders of the Superior Court of Alameda County, T. W. Harris, J., modifying interlocutory decree of divorce; directing the defendant to pay counsel fees and costs on appeal, and denying defendant's motion to set aside the judgment and grant a new trial, the defendant appealed.

The District Court of Appeal, Ward, J., affirmed all three orders.

1. Divorce 🔑309

Allegations of former wife's affidavit and testimony showing that conditions with respect to cost and maintenance of minor children had changed, likewise defendant's ability to pay, and that such changed conditions warranted an increase in payment provided in interlocutory divorce decree were sufficient to warrant modification of such decree in favor of wife.

2. Divorce 🔑309

Where a petition is filed, for increased payments for support of children of divorced parties, the only jurisdictional facts that must be alleged, are the needs of the children and the ability of the defendant to pay.

3. Divorce 🔑309

Regardless of previous arrangement by property settlement, the court may at any time modify an order providing for support of child whenever the court deems a modification proper. Civ.Code, § 138.

4. Divorce 🔑309

Court's finding as to change of conditions with respect to cost of maintenance of minor children and the defendant's ability to pay, was sufficient. Civ.Code, § 138.

5. Divorce 🔑309

It is within trial court's discretion to determine whether the circumstances had changed sufficiently to justify an increase in payments for the support of the children of divorced parties. Civ.Code, § 138.

6. Divorce 🔑312.4, 312½

On divorced husband's appeal from portion of decree providing for increased payments on account of children of divorced parties order directing divorced husband to pay attorney's fees and costs of appeal was proper notwithstanding that property settlement provided for payment by defendant of a definite amount designated as attorney's fees and costs in the divorce proceeding.

7. Divorce 🔑309

In proceeding by divorced wife for modification of decree with respect to allowances made for support of children, denial of defendant's motion for new trial on ground of inadvertence in failing to request a reporter's transcript of the evidence, was proper where no reasonable excuse was given for failure to request reporter on the hearing for modification, and no showing was made as to what the evidence would be if the reporter had been present, and no specific objection to the sufficiency to the narrative statement was made at the time it was signed and filed. Code Civ.Proc. § 473.

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Donohue, Richards, Rowell & Gallagher, Orlando J. Bowman, Oakland, attorneys for appellant.

Francis T. Cornish, Berkeley, attorney for respondent.

WARD, Justice.

Several appeals are involved herein resulting from the filing of divorce proceedings. A property settlement was executed by Mauvia and Lowell Bradford which provided a total payment of $1800 in satisfaction of prior orders of the court directing monthly payments, including the sum of $300 designated as attorney's fees and court costs in the pending proceeding. The property settlement further provided that no modification of its terms should be sought unless required by changed conditions. An interlocutory decree of divorce on the ground of extreme cruelty thereafter was rendered and entered in favor of plaintiff wife and against defendant husband. Defendant did not testify. The decree set forth "that the property settlement agreement entered into between the parties and bearing date September 30, 1947, which said agreement is on file herein, be, and it is hereby approved, except as to the provisions therein contained for child support, child custody and costs and attorney fees; * * * that, defendant pay to plaintiff the sum of Twenty Dollars ($20.00) per month as and for the support and maintenance of plaintiff beginning on the first day of December, 1947, and continuing in monthly installments on the first day of each and every month thereafter to and including September 1, 1951, or until the remarriage of plaintiff, whichever is sooner; * * *" The decree further provided for the payment by defendant of $80 per month "until the remarriage of plaintiff or the first day of October, 1951, whichever occurs sooner," and thereafter the sum of $100 per month for the maintenance and support of the two minor children. Each child was named in a separate paragraph of the decree. The decree ordering the foregoing payments was made in November, 1947, and was signed in the following February. Defendant husband appeals from the judgment rendered and entered in June, 1948, wherein the terms of the decree were modified in favor of plaintiff wife. This appeal is presented on a settled statement in lieu of a reporter's transcript.

The affidavit submitted by plaintiff in support of a motion to modify the decree substantially sets forth facts similar to the evidence produced at the proceedings had in June, 1948. The statement on appeal from the order of modification gives detailed facts in narrative form and therefore is reproduced, as follows: "Upon the testimony of the plaintiff and the testimony of the defendant after consideration of the property settlement agreement and the interlocutory decree of divorce, the following facts appeared. Plaintiff testified as follows: That $80.00 per month is not sufficient for the support of said children and she estimates the cost of such support as follows: Food $40.00, rent $14.00, utilities $14.00, milk $13.00, medicines $10.00, nursery school $23.00, didy service $7.00 (only for the younger child), cleaning $3.00, miscellaneous $5.00, haircuts (only for the elder child) $4.00, music lessons which she desires to start (only for the elder child) $4.00. She did testify that the cost for the support of said children had increased. She testified that her estimate of the cost of support and maintenance of the children at the time [of] the agreement of September 30, 1947 was in error. She is living with her mother to whom she pays $20 per month rent. Defendant testified as follows: That he was a student at the University of California until June, 1947, at which time he was employed as a criminologist by the State of California; that he worked at such employment until December, 1947, at which time he accepted employment as a criminologist in the office of the District Attorney of Santa Clara County, and that he is now employed in said office at a monthly salary of $350, less deductions, totaling $32.80, leaving a net salary in the sum of $317.20 per month, which increased his income. That in addition to said salary he has income on account of disability payments from the U. S. Government in the net amount of $35 per month, which amount has not changed during any of the period hereinabove referred to. That he has no other income from any source whatsoever. That out of said total net earnings of $352 per month, he pays $100 per month to Mrs. Bradford pursuant to interlocutory decree of divorce dated February 11, 1948, and $100 per month to holder of his promissory note in the sum of $1800 which defendant borrowed from Mrs. Bradford and paid to her pursuant to the provisions of said property settlement agreement, which payments will continue until April, 1949, leaving a net of $152 per month for his support and maintenance. That his necessary disbursements therefor are $138 per month, plus incidentals and hospital expenses in an unknown amount for a recent illness requiring hospitalization, and said $138 includes rent $38 per month; food $70 per month; drugs $10 per month; laundry and cleaning

$20 per month, plus incidentals and hospital expenses hereinabove referred to. That defendant drives a 1948 Studebaker Commander automobile, but that he only paid the maintenance cost of this and had paid nothing to acquire it; that it had been paid for and given to him by his mother after the property settlement was made, and that his mother was the same person to whom he had previously transferred his interest in his father's estate, which transfer he had previously testified at a pre-trial hearing was made without consideration because his mother would probably become a dependent and he felt he ought to provide for her."

[1–3] Upon the facts above stated, the court in its order modifying the decree set forth that the conditions with respect to cost of maintenance of the minor children had changed, likewise defendant's ability to pay, such changed conditions warranting an increase in the payments theretofore provided, and ordered increased payments in the sum of $65 per month for each of the two children. The allegations of plaintiff's affidavit and the testimony introduced appear adequate. In Metson v. Metson, 56 Cal.App.2d 328, at page 332, 132 P.2d 513, at page 515, the court said: "Certainly, it is and should be the law, that where a petition is filed, the only jurisdictional facts that must be alleged are the needs of the child and the ability of the defendant to pay." The facts of the present petition are in conformity with those of the aforementioned case. See, also, Dickens v. Dickens, 82 Cal.App.2d 717, 187 P.2d 91. The property settlement provided that no application for modification should be made except upon changed conditions, and the court found a change of conditions. Regardless of previous arrangements by property settlement, the court may "at any time" modify an order providing for child support whenever the court deems a modification proper. Civ.Code, § 138.

[4, 5] The finding made by the court that the "said change of conditions warrants an increase in the payments" is sufficient. A finding on the probative or evidentiary fact in this case is not vital to the ascertainment of the ultimate finding of fact. The evidence alone would sustain specific findings on the issue of change of conditions. However, if a finding on that issue were necessary this court, in sustaining the order and judgment, could make such finding, Code Civ.Proc. § 956a, but does not deem it advisable. Consideration of the evidence would necessarily be with the rule in mind that it was within the lower court's discretion to determine whether the circumstances had changed sufficiently to justify an increase in payments.

[6] Defendant objects to an order directing him to pay attorney's fees and costs on appeal. The property settlement provided for payment by defendant of a definite amount designated as attorney's fees and costs in the divorce proceeding. However, the present appeal is directed to the portion of the decree affecting the welfare of the children. If the wife were acting solely in her own behalf, the objection might have some merit, but the facts presented show the contrary. In addition, the interlocutory decree provided that the property settlement agreement on file "be, and it is hereby approved, except as to the provisions therein contained for child support, child custody and *costs and attorney fees.*" (Italics added.)

Defendant filed a notice of motion to set aside the judgment on ground of surprise, inadvertence and mistake and to grant a new trial. The motion is based principally upon the ground that no reporter's transcript was taken of the oral proceedings on plaintiff's application for modification of the interlocutory judgment and decree of divorce and that "review is practically impossible for lack of a sufficient record"; that there was inadvertence in the failure to request a reporter's transcript; and that there was surprise because the engrossed statement fails to show all of the facts with respect to earnings and the cost of support of the minor children. Thereupon defendant offered to dismiss the appeal if a new trial would be granted. Defendant's affidavit in support of the motion is merely an argument in favor of the motion.

[7] The offer to dismiss the appeal is of no significance. The grounds for the motion for a new trial are not set forth except as defendant's attempt to base the motion upon surprise, inadvertence and neglect. On such grounds relief may be granted, in the court's discretion, under the provisions of section 473 of the Code of Civil Procedure. No reasonable excuse is given for the failure to request a reporter on the hearing for modification, and no showing is made as to what the evidence would be if a reporter had been present. Furthermore, defendant made no specific objection to the sufficiency of the narrative statement at the time it was signed and filed.

The order, signed and filed on June 24, 1948, modifying the interlocutory decree of divorce; the order dated September 21, 1948, directing defendant to pay counsel fees and costs on appeal, and the order dated October 19, 1948, denying defendant's motion to set aside the judgment and to grant a new trial are, and each of them is, affirmed.

PETERS, P. J., and BRAY, J., concur.

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95 Cal.App.2d 20

COATES et al. v. SMITH.

Civ. 17163.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1949.

Marjorie Alice Smith Coates, by her own right, and another as trustee in the Matter of the Express Trust created by Edgar L. Smith in his last will, brought an action against Clarylin Gilman Smith alleging that defendant as executrix had fraudulently appropriated bonds left by decedent.

The Superior Court for Los Angeles County, Stanley N. Barnes, J., made orders sustaining demurrers to complaints and rendered a judgment for defendant, and from the orders and judgment, plaintiffs appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgment, dismissed the purported appeal from the orders, and held that the action was barred by the three and four year statutes of limitations.

1. Limitation of actions ⚷179(2)

Where complaint filed in 1947 against executrix alleged that she had filed inventory in 1932 but had failed to list bonds worth $50,000 which were fraudulently concealed and appropriated to her use, and further alleged that decedent in lifetime had showed bonds to plaintiff who was told they were part of testamentary trust estate, action, if one for relief on ground of fraud, was barred by the three year statute of limitations. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions ⚷179(2)

Where complaint filed in 1947 against executrix alleged that she had filed inventory in 1932 but had failed to list bonds worth $50,000 which were fraudulently concealed and appropriated to her use, and further alleged that decedent during lifetime had showed bonds to plaintiff who was told they were part of testamentary trust estate, action, if one to recover specific personalty, was barred by the three year statute of limitations. Code Civ.Proc. § 338, subd. 3.

3. Limitation of actions ⚷39(9, 11)

Where complaint filed in 1947 against executrix alleged that she had filed inventory in 1932 but had failed to list bonds worth $50,000 which were fraudulently concealed and appropriated to her use, and further alleged that decedent in lifetime had showed bonds to plaintiff who was told they were part of testamentary trust estate, action, if one to establish trust in personalty or to secure an accounting, was barred by the four year statute of limitations. Code Civ.Proc. § 343.

4. Limitation of actions ⚷180(2)

Demurrer raising statute of limitations should be sustained if it appears from face of complaint that cause of action is barred.

A. G. Reily, Los Angeles, for appellants.

Joseph Smith, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the general demurrer to the second amended complaint for the executrix's fraudulently appropriating $50,000 of bonds left by decedent should have been sustained without leave to amend where the complaint shows that the plaintiff had full knowledge of the existence of the bonds prior to decedent's demise and of the inventory filed by the executrix 14 years before the commencement of the action.

The original complaint in this action was filed October 6, 1947. By her second amended complaint appellant alleged the probate in 1932 of the will of her grandfather and the appointment of his widow, respondent, as executrix thereof and trustee of a trust created thereby; that respondent on May 24, 1932, filed an inventory of the property of the estate but failed to include in the inventory "valuable bonds in the sum of $50,000 * * * and fraudulently and designedly concealed all of said personal property from the notice, attention and consideration of the probate court * * * but fraudulently and wrongfully appropriated [them] to her own personal use and benefit."

Paragraph XIII alleged as follows: "That deceased during his lifetime acquired valuable bonds in the sum of to wit:—$50,000.00; and placed them in a locked safe box in a Bank in Hollywood for safe keeping until maturity and took plaintiff, Marjorie Alice Smith Coates, to said Bank, opened said box and showed her said bonds and told her that they were for her and that they were a part of the trust estate which he had provided for in his will and showed her that they were in the sums aggregating to wit:—$50,000.00; and also told her that the locked box in which said bonds were, was a joint box for himself and defendant, Clarylin G. Smith, and that she had a key to said box, and could open it when necessary." Respondent demurred to the pleading on the ground that it did not state facts sufficient to constitute a cause of action, and was barred by the three, four and five year statutes of limitation as prescribed by sections 337(1), 338 (1) (3) (4), and 343 of the Code of Civil Procedure. The demurrer was sustained without leave to amend and this appeal was taken from the ensuing judgment.

[1-3] The allegations of paragraph XIII of the second amended complaint leave no doubt of appellant's knowledge of the existence of the bonds prior to the decease of her grandfather. She knew as well that respondent was appointed as executrix of decedent's estate and had qualified as trustee of the testamentary trust estate without bond; that on May 24, 1932, she filed an "inventory of the property belonging to the estate of said deceased," and had attached to it a sworn statement that it contained "a true statement of all the assets of the estate of said deceased"; that such inventory included no bonds but listed only three promissory notes. Her knowledge of the bonds as imparted to her by her grandfather and the exclusion by respondent of all mention of them from the inventory left her no course other than to institute appropriate action to enforce her asserted rights. With appellant's knowledge of the facts constituting the alleged fraud, she is now precluded from commencing an action thereon fourteen years after knowledge of the conversion. Code Civ.Proc., sec. 338(4). If this action be deemed an action to recover specific personal property, it is barred in three years by subdivision 3 of section 338. If it is an action to establish a trust in personal property or to secure an accounting therefor, it is barred in four years by section 343 of the Code of Civil Procedure. Siem v. Hjelm, 49 Cal.App.2d 148, 154, 121 P.2d 87.

[4] From any view of the allegations a delay of 14 years after knowledge of the acts complained of bars appellant from all relief. "A demurrer raising the statute of limitations should be sustained if it appears from the face of the complaint that the cause of action is barred." Christina v. McLoughlin, 18 Cal.App.2d 410, 412, 63 P.2d 1174, 1175; Lewis v. Security-First

National Bank of Los Angeles, 58 Cal.App. 2d 827, 828, 137 P.2d 864.

Judgment affirmed. The purported appeal from the orders sustaining the demurrers to the complaint and the amended complaint are dismissed as nonappealable.

McCOMB and WILSON, JJ., concur.

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94 Cal.App.2d 890

FISHER et al. v. ECKERT et al.

Civ. 3891.

District Court of Appeal, Fourth District, California.

Dec. 1, 1949.

Action by Frank Fisher and Della C. Fisher against Stanley R. Eckert, individually and doing business as Eckert Motors, Jim Riley, and others, for personal injuries in which plaintiffs who had previously signed a dismissal of the action, in the presence of defendants' counsel, filed the dismissal with the clerk, and defendants filed a memorandum of costs.

The Superior Court of Inyo County, William D. Dehy, J., granted plaintiffs' motion to strike defendants' cost bill and ordered a release of plaintiffs' bond and defendants appealed.

The District Court of Appeal, Griffin, J., reversed the order holding that the dismissal in effect was a final judgment in defendants' favor and that they were entitled to costs where their bill was filed within 5 days of notice of entry of dismissal on the clerk's register.

1. Dismissal and nonsuit 🔑42

Where trial was commenced before jury and several witnesses sworn and examined and plaintiff dismissed the action without an order by filing a dismissal thereof with the clerk at a time when under the amended statute plaintiff alone was not authorized to dismiss the action in any other manner than "with prejudice" and trial court acted upon the dismissal and terminated further proceedings, plaintiff could not claim that dismissal was intended to operate "without prejudice". Code Civ.Proc. § 581.

2. Dismissal and nonsuit 🔑42

A dismissal "without prejudice" must be filed before commencement of trial, and any other form of dismissal without consent of opposite party by plaintiff after trial is commenced and jury and several witnesses have been sworn and examined is "with prejudice". Code Civ.Proc. § 581.

3. Dismissal and nonsuit 🔑42

Where plaintiff abandoned further proceedings after several witnesses had been sworn and examined in personal injury action and court dismissed jury allowing action to be dismissed without consent of all parties or showing of just cause, the dismissal was "with prejudice". Code Civ. Proc. § 581.

4. Costs 🔑32(2)
Dismissal and nonsuit 🔑42, 80

A dismissal of an action with prejudice is a final decision of the action and has the effect of terminating it and rights of the parties are affected by it to extent that it is "final judgment" in favor of defendants and defendants are entitled to recover costs. Code Civ.Proc. § 1032.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Judgment".

5. Dismissal and nonsuit 🔑79

Entry in the minutes of a dismissal, by the court constitutes sufficient entry of the judgment.

6. Dismissal and nonsuit 🔑42

Where plaintiff has dismissed action, entry of written dismissal of action on clerk's register has effect of a final judgment. Code Civ.Proc. § 581.

7. Costs 🔑199

Where a party has actual notice of entry in writing of judgment on clerk's register, written notice of such entry is not required under statute providing that prevailing party must file cost bill within five days after notice of entry of judgment on clerk's register. Code Civ.Proc. §§ 581d, 1033.

8. Costs ⚿199

Where judgment of dismissal was actually entered in the clerk's register on October 20 and defendants had actual notice of the filing thereof and that the trial court acted thereupon by excusing the jury from further attendance but there was no showing that the clerk at that time entered the dismissal on the register, statutory time for filing a cost bill would not commence to run until defendants had such notice, and a cost bill filed within five days thereof was timely. Code Civ.Proc. §§ 581, 1032, 1033.

9. Costs ⚿199

Where plaintiff dismisses action in open court but there is no showing that clerk at that time entered such dismissal on his register, time for filing cost bill by defendants does not begin to run until defendants have notice of such entry. Code Civ.Proc. § 1033.

◆

Jess G. Sutliff, Independence, Chase, Rotchford, Downen & Chase, Los Angeles, Richard T. Drukker, Los Angeles, and Otto M. Kaus, Los Angeles, for appellants.

Garrett B. Sargent, Los Angeles, for respondents.

GRIFFIN, Justice.

This is an appeal by defendant Stanley R. Eckert et al., from an order striking plaintiffs' memoranda of costs and disbursements and releasing a cash bond deposited to secure such costs.

Plaintiff brought an action against defendants for personal injuries in March, 1948, and defendants answered. On October 18, trial was commenced before a jury and several witnesses were sworn and examined. On October 20, when counsel were all present, counsel for plaintiffs, who had previously signed a dismissal of the action, filed it with the clerk and the trial judge excused the jury.

The dismissal was directed to the clerk of the court and reads: "You are hereby requested and demanded to enter dismissal of the above entitled case as to all defendants". The record shows the following dialogue between court and counsel:

"By Mr. Rotchford: May the record show that counsel for the plaintiffs has in open court filed a dismissal of this action.

"By the Court: It may be filed.

"Mr. Rotchford: May the record show, if the court please, the court being in session, the clerk has had a dismissal of this action handed to her by the attorney for the plaintiff before the court came in session, if Your Honor please.

"By the Court: The dismissal may be filed, so that ends the case so far as the jury is concerned. The jury is now dismissed from the case."

The court then adjourned. There is no record in the minutes showing that the trial court dismissed the action either with or without prejudice. A certified copy of the clerk's minutes as of October 20, shows the presence of respective counsel and that "Mr. Sargent states that he is now filing with the clerk a dismissal of this action as to all defendants. By the Court: Dismissal may be filed. The court thanks the jury and dismisses them."

Soon thereafter, in chambers, defendants' counsel met with the trial judge and the reporter. It was noted in the reporter's transcript that counsel for plaintiff refused to join with them in any such meeting. Apparently counsel for defendants desired to have placed in the record the fact that he was not consenting to such dismissal and claimed that such dismissal was of no effect by virtue of the provisions of section 581 of the Code of Civil Procedure unless such dismissal was entered "with prejudice" since the dismissal came after the commencement of the trial of the action and after plaintiffs had rested their case.

On October 20, the dismissal was entered by the clerk on the register of actions. On the 26th of that month defendants filed a memorandum of costs and on the same day mailed a copy to the attorney for the plaintiffs. On November 3, plaintiffs filed a "motion re costs". A hearing was had thereon on November 22, and by minute order dated December 13th the cost bill was stricken and the bond ordered released. Defendants appeal from the order of December 13th and argue (1) that the dismissal in effect, constituted a final judgment in defendants' favor; (2) that being defendants, and the action having been dismissed against them, they were entitled to costs as a matter of course; (3) that defendants' cost bill was filed within the time allowed by law; (4) that all items claimed as costs and disbursements were proper; and (5) that respondents' "motion re costs" was filed too late. Defendants now ask this court to reverse the order striking the cost bill and to order the lower court to reinstate the cost bond which was released.

Plaintiffs contend that the cost bill was not filed within the five days provided by law and the trial court so ruled; that the other questions attempted to be presented are immaterial and only academic and the only purpose of deciding whether such a dismissal as here filed was with or without prejudice was to use such determination in setting up a defense of res adjudicata in a subsequent action brought in the same county on the same cause of action.

Section 581 of the Code of Civil Procedure, as now amended, provides generally how actions may be dismissed, i. e., "1. *By plaintiff*, by written request to the clerk * * * at any time *before* the actual commencement of trial * * *; 2. *By either party*, upon the written consent of the other * * *; 3. *By the court*, when either party fails to appear on the trial * * *; 4. *By the court*, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it"; and subdivision 5 provides that the provisions of "subdivision 1, of this section, shall not prohibit a party from dismissing *with prejudice*, * * * at any time *before decision rendered* by the court", and that "dismissals *without prejudice* may be had in either of the manners provided for in subdivision 1 of this section, after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor."

The trial court never made a formal order of dismissal of the action. Plaintiff did dismiss it, and without an order of the court, by filing a dismissal thereof with the clerk at a time when plaintiffs alone were not authorized by sec. 581 of the Code of Civil Procedure to dismiss the action in any other manner than "with prejudice". The trial court acted upon this dismissal, at that time, by ordering it filed and then immediately discharging the jury and terminating all further proceedings in respect thereto.

[1, 2] The result of plaintiff's argument now is that he intended to dismiss the action only in case the dismissal operated "without prejudice". The effect of the 1947 amendment was to preclude just such actions on the part of plaintiffs in such proceedings. Prior to that date it was possible, up to the very moment of the decision by a trial court or a jury, to dismiss the cause of action and file another action where plaintiffs might feel that the trial court or the jury was about to decide against them. While plaintiffs in this action may not have intended such result, nevertheless counsel for plaintiffs was presumed to know the law which required the dismissal to be filed "with prejudice" at the time it was filed, and that any other form of dismissal by the plaintiff at that time would be improper under the statute.

In Burnett v. Burnett, 88 Cal.App.2d 805, 199 P.2d 685, the plaintiff, under similar circumstances, attempted to dismiss an action "without prejudice" and the court ordered it dismissed "with prejudice", notwithstanding the attempted qualified dismissal by the plaintiff. The order was sustained on the ground that the trial court at least was warranted in dismissing the action on the theory of abandonment under subdivision 4 of section 581 of the Code of Civil Procedure.

[3] It therefore should and will be presumed that the words "with prejudice" were inferentially attached to the form of dismissal as presented when it was made at a time when plaintiff had no right to make an unqualified dismissal and where the plaintiff abandoned further proceedings and the court dismissed the jury and, for all intents and purposes, did, in effect, allow a dismissal of the action, without the consent of all the parties and without a showing of just cause therefor. A dismissal, "with prejudice", should and does, *ipso facto*, result.

Plaintiffs concede that the defendants against whom the suit was dismissed, were entitled to costs, but claim that since the judgment of dismissal was filed with the clerk and known to have been so filed on October 20, the time within which defendants could file a cost bill began to run at that moment; that since it was not filed until October 26, the five days had run and the trial court was authorized to strike it.

Sec. 1033 of the Code of Civil Procedure requires that the prevailing party claiming costs must serve a copy of such cost bill upon the adverse party and file it not later than *five days after notice of entry of judgment* and a party dissatisfied with the costs claimed may, within five days of service of the copy, *file* a motion to have same *taxed*.

[4-6] A dismissal of an action with prejudice is a final decision of the action and has the effect of terminating it and the rights of the parties are affected by it and in effect it is a final judgment in favor of defendants and defendants are entitled to recover their costs. Sec. 1032, C.C.P.; Spreckels v. Spreckels, 172 Cal. 789, 158 P. 543; Whitaker v. Moran, 23 Cal.App. 758, 139 P. 901; 9 Cal.Jur. 524, secs. 16-17. Entry in the minutes of a dismissal *by the court* constitutes sufficient entry of the judgment. Colby v. Pierce, 17 Cal.App.2d 612, 62 P.2d 778; Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 P. 238; King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268; Gwinn v. Ryan, 33 Cal.2d 436, 202 P.2d 51. However, section 581d of the Code of Civil Procedure provides that "A *written dismissal* of an action shall be *entered* in the *clerk's register* * * * and is effective for all purposes when so entered", and that "All dismissals ordered by the court shall be entered upon the minutes * * * and * * * when so entered shall constitute judgments and be effective for all purposes." (Italics ours.) The clerk's register shows that on October 20 "The above entitled action is dismissed of even date herewith". In case of a dismissal by the plaintiff it is such *entry* that has the effect of a final judgment. King v. Superior Court, supra.

[7] Since the dismissal became a judgment and was entered in the clerk's register on October 20, the next question is whether defendants had *notice of such entry,* within the meaning of section 1033, supra. It is plaintiffs' argument that the presence of counsel for defendants in the court and under the circumstances related was sufficient notice of such entry. Defendants' counsel argues otherwise and maintains that defendants never did have notice of the entry of the dismissal in the clerk's register. It is true that written notice of such entry is not required where there is actual notice of such entry. Dow v. Ross, 90 Cal. 562, 27 P. 409; Mullally v. Irish-American Benevolent Society, 69 Cal. 559, 11 P. 215; O'Neil v. Donohue, 57 Cal. 226.

[8, 9] It is clear from the proceedings had that defendants did have actual notice that plaintiffs had filed with the clerk a dismissal of the action and that the trial court acted upon such dismissal by excusing the jury from further attendance. However, there is no showing that the clerk at that time had entered such dismissal on his register. In fact, the entry of such dismissal on the register could have been delayed for several days without defendants' knowledge and the time for filing such cost bill would not have run until defendants had *notices of such entry.* Hauptman v. Heebner, 34 Cal.App.

2d 600, 94 P.2d 48; King v. Superior Court, supra, 12 Cal.App.2d at page 508, 56 P.2d 268. It appears that defendants did not have notice of the entry of the dismissal on the clerk's register in the instant action and the time for filing such cost bill would not commence to run until that occurred. The cost bill was therefore filed within time. The order striking same was erroneous. In view of this determination it becomes unnecessary to determine whether or not the motion to strike the cost bill was filed within five days after service of the copy of said cost bill upon plaintiffs' counsel.

Order appealed from is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

CLARKE v. CLARKE.

Civ. 17369.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1949.

Rehearing Denied Jan. 4, 1950.

Hearing Granted Feb. 8, 1950.*

Action by Robert E. Clarke against Dorothy P. Clarke for divorce, wherein an interlocutory decree of divorce was entered which also provided for the custody of the child of the parties. Thereafter the plaintiff procured an order directing the defendant to show cause why custody should not be awarded to him and defendant be restrained from moving the child from his custody, or from the County of Los Angeles.

The Superior Court of Los Angeles County, Joe Raycraft, J., modified the order made in the interlocutory judgment by awarding custody to plaintiff for a period of six months after date of order subject to defendant's right of reasonable visitation, and provided that defendant should thereafter have custody of the child, and the plaintiff appealed.

The District Court of Appeal, Wilson, J., reversed the order as one having more regard for the happiness of the defendant and her paramour rather than for the plaintiff's rights, or for the interest of the child.

1. Divorce 🔑298(4)

In controversy between divorced parents over custody of child, court's order disposing of custody of child should have been based upon conditions existing at the time it was made, and not upon defendant's statement as to what she might do in the future.

2. Parent and child 🔑2(4)

The court has a wide discretion in awarding custody of minor children to one parent or the other, but such discretion is a legal discretion, and may be reviewed upon appeal.

3. Infants 🔑19

The prime purpose of a custodial order is the best interest of the minor child.

4. Divorce 🔑303(3)

One who seeks to have an order for custody of child of a divorced parent modified has the burden of proving that modification is justified by a change in conditions.

5. Divorce 🔑302

To warrant the vacation of an order awarding custody of minor child of divorced parents, the evidence must be clear and convincing that the welfare and best interests of the child will be directly promoted by the change.

6. Divorce 🔑303(3)

An order depriving divorced husband of the custody of his child for two and one-half months each year as provided in agreement of the parties and in the interlocutory decree and not allowing plaintiff the right to visit the child while in the custody of the defendant, and not providing that the child should not be removed by either party from the state without the other's consent as provided in their agreement, was not based on the evidence.

7. Divorce 🔑312.7

In controversy over child of divorced parents, an order which was obviously made for the accommodation and happi-

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* Subsequent opinion 217 P.2d 401.

ness of divorced wife and her paramour, and without regard for divorced husband's rights or for the interests of the child, would be reversed.

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Clarence Hansen, Los Angeles, for appellant.

Vaughan, Brandlin & Wehrle, Los Angeles, and Warren J. Lane, Los Angeles, for respondent.

WILSON, Justice.

An interlocutory judgment of divorce was entered on May 10, 1948, in favor of plaintiff, among other things awarding custody of the minor daughter of the parties to defendant except during July, August and the first two weeks of September of each year, during which time plaintiff was to have custody. Prior to the commencement of the action the parties had entered into an agreement that the custody should be awarded as recited in the interlocutory judgment. The parties further agreed that neither should take the child outside the state of California without the written consent of the other, but this condition was not included in the interlocutory judgment. Thereafter defendant went to New York City where she resided for a period of time leaving the child in Los Angeles in the custody of plaintiff who, jointly with Mrs. Pinder, defendant's mother, cared for the child. Subsequently, with the consent of plaintiff, Mrs. Pinder took the child to New York where they, with the child's mother and the latter's sister, resided in an apartment. Plaintiff having ascertained that defendant was engaging in illicit relations with one Korf, went to New York and brought the child to Los Angeles. Defendant returned here and upon her application a writ of habeas corpus was issued to determine the custody of the child. Plaintiff countered with an affidavit upon which an order was issued directing defendant to show cause why custody should not be awarded to him and defendant be restrained from removing the child from his custody or from the county of Los Angeles. After a hearing an order was made, on April 7, 1949, modifying the order made in the interlocutory judgment by awarding custody to plaintiff for a period of six months after the date of the order subject to defendant's right of reasonable visitation; thereafter defendant to have custody of the child. Until further order of the court both parties were restrained from removing the child from the state of California for a period of six months. Plaintiff has appealed from that order.

The result of the order is that (1) plaintiff is not permitted to have custody of the child at any time; (2) he is not given the right to visit her at all; (3) defendant may take her out of the state when she chooses and is not required to return her.

Plaintiff testified that he went to New York and observed Korf calling in the evening at the apartment where defendant resided and not departing until the following morning. He thereupon took possession of the child and brought her to Los Angeles. Defendant's mother and sister, who resided in the same apartment, both testified that on many occasions Korf and defendant occupied the same room all night, and that the child slept in the same room; that Korf undertook to exercise parental control over the child, reproved and reprimanded her and undressed her on several occasions; that Korf said she was "onery" and her will would have to be broken; that he stated "if ever he had anything to do with this child, which he did expect to, that he would see that I [Mrs. Pinder] and all the families on both sides would never see this child again."

Defendant freely admitted that she had had sexual relations with Korf on many occasions in her room but denied that such conduct was in the "presence" of the child; she admitted that Korf had slept in the same room with her when the child was there but asserted that the baby was asleep at such times.

It is in evidence that the child, who was more than three years old when such occurrences took place, was happy with her father and with Mrs. Pinder; that she disliked Korf intensely and did not want him to touch her.

Plaintiff testified that he had a home for his child; that her grandmother, Mrs. Pinder, would assist in caring for her; that he had made provision for her being in the sunlight, and that she would have proper care and attention.

Defendant's effort to show that plaintiff was an improper person to have custody of the child failed in its purpose. On cross-examination he admitted he knew certain persons whose names were mentioned who were known to be homosexuals. He stated that he knew them while engaged in theatrical work where it was impossible to avoid mingling with them. There was no evidence that he associated with them socially, that he visited in their homes, or they in his.

There was no evidence that conditions had changed after the entry of the interlocutory judgment of divorce insofar as plaintiff and Mrs. Pinder were concerned, but it did show that conditions that surrounded defendant and her mode of living had changed for the worse.

[1] The meretricious relations of defendant and Korf had occurred while she was still the legal wife of plaintiff, since at the time of the hearing which resulted in the order appealed from the time for entry of the final judgment had not expired. The court was not justified in accepting as true and acting upon her statement that she intended to marry Korf after the entry of the final decree. The order should have been based upon conditions existing at the time it was made and not upon defendant's statement as to what she might do in the future.

[2-5] The court has a wide latitude of discretion in awarding custody of minor children to one parent or the other. Such discretion is not unlimited. It is a legal discretion and may be reviewed upon appeal. The prime purpose of a custodial order is the best interest of the minor child. One who seeks to have an order for custody modified has the burden of proving that modification is justified by a change of conditions. Munson v. Munson, 27 Cal.2d 659, 670, 166 P.2d 268. To warrant the vacation of an order awarding custody the evidence must be clear and convincing that the welfare and best interests of the child will be directly promoted by the change. Johnson v. Johnson, 72 Cal.App.2d 721, 723, 165 P.2d 552; Washburn v. Washburn, 49 Cal.App.2d 581, 588, 122 P.2d 96.

[6] No reason appears in the evidence, and in announcing its decision the court expressed none, (1) for depriving plaintiff of the custody of his child for two and one-half months each year, as provided in the agreement of the parties and in the interlocutory decree; (2) for not allowing plaintiff the right to visit the child while in the custody of defendant; (3) for not ordering that the child should not be removed by either party from the state of California without the other's consent, as provided in their agreement.

[7] The trial judge's amazing attitude with reference to defendant's licentious conduct is reflected in his remarks preceding his announcement of the order. He admired her frankness and condoned her acts as human and natural, and stated that the mother and her fiance, both before and following their marriage for a reasonable time, would be happier if the child were not with them. Their convenience appears to have been the chief element in the court's mind and sole reason for permitting custody to remain in plaintiff for six months. It is manifest that the court did not regard him as an improper person to have custody of his child, otherwise he would not have been permitted to keep her for six months. It is also clear that the order was made for the accommodation and happiness of defendant and her paramour and without regard for plaintiff's rights or for the interest of the child.

Order reversed.

MOORE, P. J., concurs.

McCOMB, J., concurs in the judgment.

34 Cal.2d 431

ODONE v. MARZOCCHI.

S. F. 17674.

Supreme Court of California.

Dec. 15, 1949.

On petition for rehearing.

The Supreme Court, Per Curiam, denied the petition, and held that on retrial pleadings might be recast in such manner as to tender any issues available at former trial.

For original decision of the Supreme Court which reversed the judgment of the Superior Court of the City and County of San Francisco, Edward P. Murphy, J., see 211 P.2d 297.

Prior opinion, 200 P.2d 180.

Appeal and error 🔑1201(3)

Where judgment of reversal rendered by Supreme Court was general, setting the case at large in the trial court, pleadings in case of a retrial could be recast in such manner as to tender any issues which were available to the parties at the former trial, even though not disclosed by record before Supreme Court.

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McCarthy & Rowell, Redwood City, Julian A. Pardini, San Francisco, for appellant.

Albert Picard, San Francisco (Alfred E. Graziani, San Francisco, of counsel), for respondent.

PER CURIAM.

Respondent has petitioned for a rehearing contending that the opinion of this Court erroneously states that the cross-complaint was not answered by respondent and must, therefore, be taken as true, and that this Court erred in holding that a wife may make a valid gift causa mortis of one-half of the community property. Respondent concedes that the record before this Court fails to disclose any denial of the allegations of the cross-complaint, but he asserts that appellant stipulated in the trial court that these allegations should be deemed denied, but that this stipulation was not made a part of the record on appeal. Since the statement in the opinion is in accord with the record on appeal before this Court, and the judgment of reversal rendered by this Court is general, setting the case at large in the trial court, if the case is to be retried the pleadings may be recast in such manner as to tender any issues which were available to the parties at the former trial.

There is no merit in the petition for rehearing and the same is, therefore, denied.

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34 Cal.2d 515

SAPP et al. v. BARENFELD et al.

L. A. 20682.

Supreme Court of California, in Bank.

Dec. 6, 1949.

As Modified Dec. 13, 1949.

David M. Sapp and another, doing business under the fictitious firm name and style of The Sapp Construction Company, filed a petition to confirm an award of arbitrators of a dispute arising under petitioners' contract to reconstruct a building owned by Abraham Barenfeld and another, doing business under the fictitious firm name and style of A & J Building Company, who contested the petition and moved to vacate the award.

From an order of the Superior Court of Los Angeles County, Allen W. Ashburn, J., vacating the award, petitioners appealed.

The Supreme Court, Traynor, J., reversed the order, holding that respondents, having participated in informal hearings by the arbitrators without objection, could not attack the award because no formal notice of hearing was given them and that the arbitrators did not err in basing the award on a skilled cost appraiser's estimate of the cost of remedying defects in petitioners' work.

Schauer, J., dissented.

Prior opinion, Cal.App., 204 P.2d 413.

1. Appeal and error 🔑842(2)

The finality of trial court's fact findings, supported by evidence, on appeal, cannot be extended to court's legal conclusions therefrom, and judgment thereon must be reversed, if such conclusions are incorrect.

2. Arbitration and award 🔑77

The trial court's findings that arbitrators consulted ex parte with a person not party to arbitration as to specific matter within submission and that parties moving to vacate arbitrators' award were not present at such consultation did not support such parties' contention that they were wholly denied notice and hearing by arbitrators. Code Civ.Proc. § 1288 (c, d).

3. Arbitration and award 🔑46

Building owners, present at and participating without objection in informal hearings on tours of inspection by arbitrators of dispute arising from contractors' alleged failure to reconstruct building according to specifications and finish it within specified time, could not attack arbitrators' award because no formal notice of hearing was given them. Code Civ.Proc. § 1288(c, d).

4. Arbitration and award 🔑46

A party appearing and participating without objection in arbitral proceedings cannot later object to arbitrators' award on ground that he had no notice of hearing, even if formal notice of hearing was expressly stipulated for in submission agreement. Code Civ.Proc. § 1288(c, d).

5. Arbitration and award 🔑31

Arbitrations are not subject to all rules of judicial procedure save those relating to form of questions, as essence of arbitration is its freedom from formality of ordinary judicial procedure.

6. Arbitration and award 🔑31, 34

At arbitration hearing, all relevant evidence may be freely admitted and rules of judicial procedure need not be observed so long as hearing is fairly conducted.

7. Arbitration and award 🔑31

An arbitration hearing may be in nature of informal conference rather than judicial trial.

8. Arbitration and award 🔑34

Witnesses at arbitration hearing need not be sworn, in absence of express agreement therefor.

9. Arbitration and award 🔑34, 48

Arbitrators of dispute between parties to building reconstruction contract as to contractors' alleged failure to perform work according to specifications and finish it on time did not err in consulting ex parte with skilled cost appraiser for estimate of labor and material cost of remedying defects in work and basing award on such estimate after checking it with several building supply firms.

10. Arbitration and award 🔑31, 32

Though hearing before arbitrators of dispute between parties to building reconstruction contract as to contractors' alleged failure to perform work according to specifications and finish it on time is required on disputed fact questions, arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates, and such procedure may be ex parte without notice to or hearing of parties to arbitration.

11. Arbitration and award 🔑34

Arbitrators may properly obtain from disinterested persons of acknowledged skill such information and advice concerning technical questions submitted to arbitrators as may be necessary to enable them to reach correct conclusions, if award is result of their own judgment after obtaining such information.

12. Arbitration and award 🔑34

Architects, chosen for their technical qualifications to arbitrate dispute between parties to building reconstruction contract as to contractors' alleged failure to perform work according to specifications, could determine construction costs, as experts, from their own experience, or enlist trained appraiser's aid in determining amount of award.

13. Arbitration and award 🔑57

Arbitrators' failure to make express finding on building owners' claim of damages for contractors' delay in completing re-construction of building in award of balance due contractors after deducting cost of work necessary to remedy defects in performance thereof did not invalidate award.

14. Arbitration and award 🔑57

Generally, arbitrators need not find facts and give reasons for their awards.

15. Arbitration and award 🔑57

An arbitration award is valid if it settles entire controversy between parties to submission.

16. Arbitration and award 🔑57

Arbitrators' decision simply that one of parties to submission should pay the other a sum of money was sufficiently determinative of all items embraced in submission to arbitrators of dispute as to performance of building re-construction contract according to specifications.

17. Arbitration and award 🔑89

An affidavit of arbitrator, appointed by building owners, as to arbitrators' failure to consider such owner's damage from contractors' delay in completion of work under building re-construction contract, was not inadmissible in evidence on owners' motion to vacate award as tending to impeach affiant's award. Code Civ.Proc. § 1288(c, d).

18. Arbitration and award 🔑89

Though an arbitrator cannot impeach arbitration award by testifying as to his fraud or misconduct, his testimony is admissible to show what matters were submitted for decision and considered by arbitrators.

19. Arbitration and award 🔑48

The trial court's finding that item of damage to building owners from contractors' delay in completing work under building re-construction contract was not considered by arbitrators in awarding contractors balance due under contract, after deducting cost of work necessary to remedy defects in performance thereof, did not support court's conclusion that award was invalid.

20. Arbitration and award 🔑48

Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision on broad principles of justice and equity, and in so doing may expressly or impliedly reject a claim which a party to arbitration might successfully have asserted in judicial action.

21. Arbitration and award 🔑73

A claim of party to arbitration proceedings must be expressly raised at some time before arbitrators' award to be considered, and arbitrators' failure to consider claim which can only be implied from facts alleged is merely error of judgment, not subject to judicial review, in absence of fraud or gross misconduct.

22. Arbitration and award 🔑63

Arbitrators' omission to find as to certain items included in submission is in effect a disallowance thereof, which becomes final and conclusive when award is made and proper notice thereof given to interested parties, though such omission is due to arbitrators' mistake.

23. Damages 🔑163(1)

Proof of breach of contract is insufficient to entitle party to damages therefor without proof that damage was suffered.

24. Arbitration and award 🔑57

Arbitrators of disputes between parties to building re-construction contract were not required to consider item of damages claimed by building owners for contractors' failure to complete construction within time specified, in absence of evidence on which computation of such damages could be based.

25. Arbitration and award 🔑57

A party asserting claim in arbitration proceeding must produce evidence supporting it, and if he fails to do so, he cannot attack award on ground that such claim was not considered by arbitrators.

26. Arbitration and award 🔑57

Where building reconstruction contract made no provision for reduction of contract price or payment of liquidated damages in event of breach of contract provision as to time for completion of work, submission to arbitration of disputes between parties stated only that building owners contended that contractors did not comply with such provision, without alleging damages suffered thereby, and owners introduced no evidence of loss of net income claimed by them, but first asserted such claim by affidavits in opposition to contractors' petition to confirm arbitrators' award, arbitrators' failure to consider such damages did not invalidate award. Code Civ.Proc. §§ 1287, 1288(c, d).

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Laurence J. Rittenband, Los Angeles, and Leo Jay Ross, Beverly Hills, for appellants.

Knight, Gitelson & Ashton and Alfred Gitelson, Los Angeles, for respondents.

TRAYNOR, Justice.

On December 31, 1946 appellants contracted to reconstruct a building owned by respondents that had been damaged by fire. It was agreed that appellants were to restore the building to the condition it was in immediately before the fire in accord with the original plans and specifications. Work was to begin within fifteen days and to be completed within 180 days thereafter. Any dispute arising under the contract was to be submitted to arbitration. A dispute arose over the alleged failure of the appellants to perform the work according to the specifications and to finish it on time. Appellants denied these allegations and sought additional compensation under the contract for extra work performed. On September 2, 1947, the parties agreed in writing to submit their dispute to arbitration. Respondents and appellants each appointed one arbitrator and these two selected a third. All three were qualified architects. On November 19, 1947 the arbitrators rendered a unanimous opinion, finding that appellants had failed to conform to the specifications in several instances. After deducting the cost of the work necessary to remedy the defects from the balance due appellants under the contract, the arbitrators made an award of $6966.45 to appellants. Pursuant to Section 1287 of the Code of Civil Procedure, appellants petitioned the superior court for an order confirming the award. Respondents contested the petition and moved to vacate the award under Sections 1288(c) and (d) of the Code of Civil Procedure. After a hearing on affidavits, the trial court found (1) that "Said arbitrators were guilty of misconduct in that they based their award in a large part upon information procured ex parte from third persons, with no notice to the parties hereto that they intended to adopt such a procedure, and gave the parties hereto no opportunity to cross-examine such third persons" and (2) that "Said arbitrators so imperfectly executed their powers that a mutual, final and definite award, upon the subject matter submitted was not made, in that said arbitrators failed to pass upon respondents Barenfelds' claim for damages for delay in completing the building which was the subject of the controversy." The court entered an order vacating the award, and this appeal followed.

[1] Appellants do not contend that the trial court's findings of fact are not supported by substantial evidence. They admit that those findings are supported by the evidence and are therefore conclusive on this appeal. The finality of the court's findings of fact cannot, however, be extended to the legal conclusions it derives therefrom, and if those conclusions are incorrect, as appellants assert, the judgment must be reversed.

[2] The findings of the trial court do not support respondents' broad assertions that they were denied notice and hearing. The court found only that the arbitrators had consulted ex parte with a third person as to a specific matter within the submission and that respondents were not present at that consultation. This finding lends no support to respondents' contention that they were wholly denied notice and hearing and that the trial court so found.

[3, 4] The evidence in fact clearly establishes that the arbitrators did hold informal hearings, at each of which the respondents were present and vigorously prosecuted their claims, presenting evidence in support thereof. Respondents' affidavits contradict their allegations that they were denied a hearing and indicate

clearly that they were afforded ample opportunity to present their claims to the arbitrators. Although respondents allege that, as far as they know, the arbitrators never held any hearings, the evidence conclusively establishes that this allegation is untrue. Respondents' attorney, by letter to the arbitrators, suggested "that the arbitrators and the parties meet at the building involved and that the hearings be there held." Pursuant to this suggestion, the arbitrators made a tour of inspection of the building on September 23, 1947, at which time Abraham Barenfeld was present. Barenfeld states in his affidavit that, on that inspection, he accompanied the arbitrators and "From time to time as we walked through I would point out objections to various items in the building which had been either improperly constructed or not constructed at all by the petitioners." Another tour of inspection was conducted on October 9, 1947, Abraham Barenfeld being again present together with one of the Sapps. Both parties actively participated in the discussion of the alleged defects, and respondent "again stated various objections to the arbitrators that I had to the work of construction by the petitioners which I had not mentioned on their first visit." The arbitrators made a final tour of inspection on October 21, 1947. Jack Barenfeld admits that he was present at that time and "pointed out to them numerous items in the building which had been either improperly constructed or not constructed at all."

There is no evidence that any other hearings were held. There is clear and uncontradicted evidence, supported by the affidavits of the respondents, that these tours of inspection were for all purposes fair and effective hearings that placed no restriction upon respondents' opportunity to advance all relevant claims. Since respondents were present at each of the hearings and participated therein without objection, they cannot attack the award because no formal notice of hearing was given. "If a party appears and participates without objection in arbitral proceedings * * * such party cannot later object to the award * * * on the ground that he did not have notice of the hearing * * * This is true, it was held, although formal notice of the hearing was expressly stipulated for in a submission agreement." Sturges, Commercial Arbitration and Awards, § 152, pp. 382-383; Tennessee Coal Iron & R. Co. v. Roussell, 155 Ala. 435, 46 So. 866, 130 Am.St.Rep. 56; Acme Lumber Co. v. Ruby, 237 Mich. 314, 316, 211 N.W. 631; Mississippi Cotton Oil Co. v. Buster, 84 Miss. 91, 36 So. 146, 147; Jacob v. Pacific Export Lumber Co., 136 Or. 622, 639, 297 P. 848; Canuso v. City of Philadelphia, 326 Pa. 302, 307, 192 A. 133; see 6 Am.Jur., Arbitration & Award, § 104.

[5-8] Respondents, however, apparently contend that the tours of inspection were not valid hearings for the reason that they were not conducted with the formalities of a judicial hearing. This contention is exemplified by the affidavit of respondents' attorney "That at all times concerned it was and now is your affiant's opinion that arbitrations are to be conducted in the same manner and with the same formalities, excepting only technical objections as to questions, that a trial in a court is required to be conducted." It has never been the law that arbitrations are subject to all rules of judicial procedure save those relating to the form of questions. "The essence of arbitration is its freedom from the formality of ordinary judicial procedure." Canuso v. City of Philadelphia, 326 Pa. 302, 307, 192 A. 133, 136. All relevant evidence may be freely admitted and rules of judicial procedure need not be observed so long as the hearing is fairly conducted. The hearing may be in the nature of an informal conference rather than a judicial trial. Dana v. Dana, 260 Mass. 460, 464, 157 N.E. 623; Modern System Bakery v. Salisbury, 215 Ky. 230, 236, 284 S.W. 994; Jacob v. Pacific Export Lumber Co., 136 Or. 622, 637, 645, 297 P. 848; Broadhead-Garrett Co. v. Davis Lumber Co., 97 W.Va. 165, 169, 172, 124 S.E. 600. Respondents repeatedly stress the fact that witnesses were not sworn, but in the absence of express agreement there is no requirement that they be sworn. Matter of Silliman, 159 Cal. 155,

158, 113 P. 135; Hano v. Isaac H. Blanchard Co., Sup., 199 N.Y.S. 227, 230. "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid." American Almond Products Co. v. Consolidated Pecan Sales Co., Inc., 2 Cir., 144 F.2d 448, 451, 154 A.L.R. 1205.

[9-11] The disputed questions of fact were determined by the arbitrators on the basis of the claims and evidence adduced at the hearings. Having determined therefrom that the work in some respects did not conform to the specifications, the arbitrators, to determine the amount of the award, consulted ex parte with C. L. Weeks, a skilled cost appraiser, for an estimate of the labor and material cost of remedying the defects. They checked his estimate with several building supply firms and adopted it in making their award after this independent investigation. The award was the result of the arbitrators own judgment, based, however, on information acquired in this manner.

There is no error in such procedure. Although a hearing is required on disputed questions of fact, arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. Sturges, Commercial Arbitration and Awards, § 217, p. 495. This procedure may be ex parte, without notice or hearing to the parties, for "it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information." 1 Mechem, Agency, § 310, p. 229; City of Omaha v. Omaha Water Co., 218 U.S. 180, 198, 30 S.Ct. 615, 54 L.Ed. 991, 48 L.R.A., N.S., 1084; California Annual Conf. of M. E. Church v. Seitz, 74 Cal. 287, 295, 15 P. 839; Dore v. Southern Pacific Co., 163 Cal. 182, 189, 124 P. 817; Simons v. Mills, 80 Cal. 118, 120, 22 P. 25; Foster v. Carr, 135 Cal. 83, 86, 67 P. 43; Rives-Strong Bldg., Inc., v. Bank of America, 50 Cal.App.2d 810, 814-817, 123 P.2d 942; Gord v. F. S. Harmon & Co., 188 Wash. 134, 140, 61 P.2d 1294; Liggett v. Torrington Bldg. Co., 114 Conn. 425, 432, 158 A. 917; Koepke v. E. Liethen Grain Co., 205 Wis. 75, 77, 236 N.W. 544; Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc., 112 Colo. 155, 147 P.2d 828; City of Bangor Savings Bank v. Niagara Fire Ins. Co., 85 Me. 68, 76–77, 26 A. 991, 20 L.R.A. 650, 35 Am.St.Rep. 341. It is immaterial whether the subject of the appraisal is the only matter in dispute or is part of a broader submission. Gord v. Harmon & Co., supra; Hegeburg v. New England Fish Co., 7 Wash.2d 509, 110 P.2d 182; City of Bangor Savings Bank v. Niagara Fire Ins. Co., supra; Sturges, supra, § 217, p. 495-498. It is not true, as respondents assert, that the foregoing cases are distinguishable on the ground that the submission agreements contemplated that the arbitrators should be allowed to resort to these additional sources of information. An examination of these cases reveals that hearings on disputed questions of fact were expressly or impliedly required and were actually held. In each of these cases, however, resort to these additional sources of information was held to be authorized by the nature of the dispute, not by the terms of the submission agreement. City of Omaha v. Omaha Water Co., 218 U.S. 180, 198, 30 S.Ct. 615, 54 L.Ed. 991, 48 L.R.A.,N.S., 1084; American Almond Products Co. v. Consolidated Pecan Sales Co., Inc., 2 Cir., 144 F.2d 448, 450, 154 A.L.R. 1205. Stockwell v. Equitable Fire & Marine Ins. Co., 134 Cal.App. 534, 25 P.2d 873, relied upon by respondents, is not controlling here. In that case, the failure to accord plaintiff a hearing was part of a fraudulent and collusive agreement between the arbitrators to undervalue plaintiff's property, and the award was vacated for that reason.

[12] The arbitrators were chosen for their technical qualifications. As experts, they could determine construction costs from their own experience, or enlist the aid of a trained appraiser in determining the amount of the award. Respondents were not denied a hearing on any issue on which the law gives them a right to be heard.

[13-16] As an alternative ground for vacating the award, the trial court found that it was not mutual, final, and definite because the arbitrators did not consider respondents' claim of damages for the delay in completion of the building. The failure to make an express finding in the award on that claim does not invalidate the award. "There is no general rule that arbitrators must find facts and give reasons for their awards. In fact, the rule and general practice is to the contrary." Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 232, 174 P.2d 441, 444; Popcorn Equipment Co. v. Page, 92 Cal. App.2d 448, 207 P.2d 647; In re Connor, 128 Cal. 279, 282, 60 P. 862; Dugan v. Phillips, 77 Cal.App. 268, 278, 246 P. 566; Bank of Coronado v. Shreve, 51 Cal.App. 353, 357, 196 P. 787. The dictum to the contrary in Muldrow v. Norris, 12 Cal. 331, 339, relied upon by respondents, is no longer controlling in view of the foregoing decisions and is disapproved. The award is valid if it serves to settle the entire controversy. A decision simply that one of the parties should pay the other a sum of money is sufficiently determinative of all items embraced in the submission. Fulmore v. McGeorge, 91 Cal. 611, 615-616, 28 P. 92; Dugan v. Phillips, 77 Cal.App. 268, 278, 246 P. 566; Rice v. Hassenpflug, 45 Ohio St. 377, 13 N.E. 655.

[17-19] To prove the arbitrators' failure to consider the item of damage from the delay in completion, respondents introduced the affidavit of the arbitrator whom they had appointed, Maurice Fleishman. Appellants' contention that Fleishman's affidavit was inadmissible as tending to impeach his award cannot be upheld. Although an arbitrator cannot impeach the award by testifying to his fraud or misconduct, his testimony is admissible to show what matters were submitted for decision and were considered by the arbitrators. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353; Osborne v. Colvert, 86 N.C. 170, 171; Sturges, Commercial Arbitration and Awards, § 365, p. 786. The trial court found that the item had not been considered by the arbitrators in making their award. This finding, however, does not support the conclusion of the trial court that the award was invalid.

[20-22] Even though a party expressly asserts a lawful claim in the submission or raises [illegible] by the presentation of evidence to the arbitrators, the law does not guarantee that the claim will be allowed. Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. Gerdetz v. Central Oregon Irr. Co., 83 Or. 576, 580, 163 P. 980; Everett v. Brown, 120 Misc. 349, 198 N.Y.S. 462, 465; Koepke v. E. Liethen Grain Co., 205 Wis. 75, 80, 236 N.W. 544. The claim must be expressly raised at some time before the award. If it can only be implied from the facts alleged, the failure to consider it is only an error of judgment that in the absence of fraud or gross misconduct is not subject to judicial review. "Even if the omission to find as to those items was due to a mistake on the part of the arbitrators, nevertheless the omission was in effect a disallowance of those items, which became final and conclusive when the award was made and proper notice thereof given to the interested parties." Koepke v. E. Liethen Grain Co., 205 Wis. 75, 80, 236 N.W. 544, 546; Carsley v. Lindsay, 14 Cal. 390, 394; Montifiori v. Engels, 3 Cal. 431, 434; Glesby v. Balfour, Guthrie & Co., 63 Cal.App. 2d 414, 417, 147 P.2d 60.

[23-26] The arbitration agreement in the present case did not expressly submit to the arbitrators the issue of damages resulting from delay in completing the building. Paragraph 5 of the construction contract required completion within 180 days, but made no provision for reduction of the total contract price or payment of liquidated damages in the event of a breach. The

submission to arbitration stated only that "Barenfelds contend that the said Sapps did not comply with the provisions of paragraph (5)," without alleging damage suffered thereby. Proof that a contract has been breached is not sufficient to entitle a party to damages for the breach without proof that damage has been suffered. The arbitrators were not required to consider the item of damages for failure to complete the construction within 180 days unless they were presented with evidence upon which a computation of damages could be based. A party who asserts a claim in an arbitration proceeding must produce evidence in support of that claim; if he fails to do so, he cannot attack the award on the ground that the claim was not considered by the arbitrators. Montifiori v. Engels, 3 Cal. 431, 434. Although the undisputed facts show that they had ample opportunity, respondents failed at any of the several hearings to introduce any evidence of the loss of rental income which they now claim. The first time that the claim was expressly asserted was by the affidavits in opposition to the petition for confirmation of the award. Under these circumstances the determination of damages would be but a legal conclusion that the arbitrators might have drawn from the facts found. The failure to consider these damages cannot invalidate the award. In re Connor, 128 Cal. 279, 281–282, 60 P. 862; Carsley v. Lindsay, 14 Cal. 390, 394.

The order vacating the award and denying the application for confirmation of the award is reversed with directions to enter an order confirming the award.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

Admittedly the evidence supports the trial court's findings of fact; those findings, reasonably construed in favor of the judgment, adequately support it. By the rules of law which heretofore have generally been respected by appellate courts the judgment should be affirmed.

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95 Cal.App.2d 36

NEWBAUER v. NEWBAUER.

Civ. 14061.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1949.

Mary Lou Newbauer brought a suit for divorce against Thomas Newbauer.

The Superior Court in and for the City and County of San Francisco, William F. Traverso, J., rendered a decree for the plaintiff and she appealed, contending that alimony award, award of attorney fees, and award of costs were inadequate.

The District Court of Appeal, Dooling, J., affirmed the decree, holding that Superior Court did not abuse its discretion in limiting amount of alimony awarded to plaintiff or in awarding counsel fees, and that plaintiff could not complain of amount of costs.

1. Divorce ⚷235, 286

Trial court has a wide discretion in making an award of alimony in a divorce action, and before appellate courts will interfere, it must be made clearly and affirmatively to appear on face of entire record that such discretion has been abused. Civ.Code, § 139.

2. Divorce ⚷240(2)

In determining amount of alimony to which wife who was granted a divorce, was entitled, trial court could consider fact that wife had been self-supporting at time of marriage, that she was still relatively young, and that despite her existing physical incapacity, her own physician expected her to be sufficiently recovered in not less than four months or one year to be able to assume some gainful employment. Civ. Code, § 139.

3. Divorce ⚷286

On appeal by wife from decree allowing an allegedly insufficient amount of alimony, fact that members of District Court of Appeal might have been more liberal is not the test. Civ.Code, § 139.

4. Divorce ⚷286

The discretion in awarding alimony is that of the trial judge, and District Court of Appeal can only interfere if it finds that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made order that he did. Civ.Code, § 139.

5. Divorce 🔑235

Where wife had been self-supporting at time of marriage, she was still relatively young, and despite her existing physical incapacity, her own physician expected her to be sufficiently recovered in not less than four months or a year to be able to assume some gainful employment, award of alimony at rate of $350 a month for first year and $300 for second year, was not so insufficient as to amount to an abuse of discretion, though income of husband before payment of income taxes, approximated $2,000 a month. Civ.Code, § 139.

6. Divorce 🔑227(2)

Award of $2,200 to attorney who procured divorce for a wife in trial lasting seven days, was not inadequate.

7. Divorce 🔑286

The determination of amount of attorney fees in a divorce action is primarily for the trial court.

8. Attorney and client 🔑140

Considerable leeway must be allowed to judicial discretion in fixing attorney's fees since it is common knowledge that legal charges are far from being standardized.

9. Divorce 🔑284

Allowance of $500 to wife for counsel fees to prosecute appeal from divorce decree allegedly allowing her insufficient amount of alimony, was adequate.

10. Divorce 🔑179

Where no showing of actual costs or amounts thereof was made by wife in divorce action, wife was in no position to urge the matter on appeal.

◆

Rowland R. King, San Francisco, John A. Sinclair, San Francisco, for appellant.

Oscar Samuels and Tevis Jacobs, San Francisco, Young, Hudson & Rabinowitz, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff secured an interlocutory decree of divorce from defendant on the ground of cruelty. She appeals from that portion of the decree allowing alimony and counsel fees asserting that the trial court abused its discretion in not allowing more, and also attacks the decree for its failure to make any provision for her costs of suit. After entry of the decree plaintiff made a motion for an allowance of additional counsel fees and costs to prosecute her appeal. She was allowed the actual costs of the appeal and $500 for counsel fees. She is also appealing from this allowance of $500.

The parties were married in Texas in October 1942 while defendant was a private in the U. S. Army. At the time of their marriage plaintiff was 34 years of age and employed in a clerical position at $125 per month. After the marriage she lived with defendant at army camps in Wisconsin and Maine until defendant was sent overseas in May 1943. Defendant returned from his overseas duties in August 1945. Up to that time the relations between the spouses had been cordial and harmonious.

Commencing with his return to the United States defendant engaged in a course of continuous drinking to the point of chronic alcoholism. He was in and out of sanitariums and under the intermittent care of physicians and nurses as a result and his conduct toward plaintiff when intoxicated was abusive, and when not intoxicated he at time studiously ignored her. Whether or not he subjected her to physical violence is disputed, except for the incident in Santa Fe hereafter discussed.

About September 1946 defendant stopped drinking and joined Alcoholics Anonymous. To plaintiff's knowledge he has not drunk intoxicating liquors since. He continued to be abusive to plaintiff however and finally in the summer of 1947 while the spouses were in Santa Fe, New Mexico, plaintiff left defendant and came to San Francisco.

Plaintiff's back, commencing in 1944, had been subject to strain and soreness and in

October 1946 she consulted a Dr. Anderson who tapped her back. Plaintiff testified that just before the separation of the parties in Santa Fe defendant had picked her up, twisted her arm behind her back and carried her from one room to another and dropped her onto the floor. She testified further that this incident caused the injury to her back for which she afterwards was compelled to undergo an operation. Defendant denied picking her up or twisting her arm or body, his version being that he took her by the arm and forced her backward from one room to the other. In any event on her return to San Francisco plaintiff again consulted Dr. Anderson and he found her in extreme pain from a herniated intervertebral disc which was pressing on the spinal nerve leading to the left leg. This resulted in severe pain, restricted motion, abnormal posture and some atrophy of the left leg from buttock to calf. Dr. Anderson first put her in traction, but when this failed to relieve her condition, she was in December subjected to an operation by which the herniated disc was removed and the opposing vertebrae fused together with a piece of bone taken from the patient's hip. At the time of the trial in the following May plaintiff was still incapacitated and wearing a back brace. The doctor testified that when she will be able to do work such as secretarial work or sales work "will depend a great deal on her future course and symptoms and findings. * * * I think eventually she will be able to return to that type of work. I don't know how soon, but I think, with passage of time and improvement in her condition, she probably will be able to return to work—light work." On cross-examination Dr. Anderson testified that "I believe that she probably will over a period of several months get to the point where she can do light work * * * I think probably not less than three or four months and probably within a year." Dr. Anderson also stated that an incident such as plaintiff described in Santa Fe might result in the rupture of the intervertebral disc which he found on her return.

Defendant is the beneficiary of two substantial trusts and the court found that his income, before payment of income taxes, approximates $2,000 per month. The court allowed plaintiff alimony for two years only, at the rate of $350 per month for the first year and $300 per month for the second. The interlocutory decree also orders the payment by defendant of listed bills accrued, including doctor bills, of $2,974.55.

The defendant's cruelty was alleged in general terms as permitted by the code, sec. 426b, Code Civ.Proc., the allegation reading: "That * * * said defendant * * * has committed acts of cruelty upon and toward the plaintiff; that these acts have caused plaintiff great and grievous mental and physical suffering, with the result that the health of plaintiff has been seriously impaired."

The trial court found that these allegations of the complaint are true. The only serious impairment of health established was the injury to plaintiff by reason of the herniated disc so that we must assume that the trial court found that this injury resulted from defendant's conduct as testified by plaintiff.

It is appellant's position, having in view the circumstances of the parties (sec. 139, Civ.Code) and the aggravated course of conduct of the defendant culminating in the serious and at least temporarily incapacitating injury to plaintiff, that the court abused its discretion in making the award that it did for the limited period of only two years.

[1] However it is the settled rule that in making an award of alimony the trial court has a wide discretion. "Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that this discretion has been abused." Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670, 674; 1 Cal.Jur. 1012. The code itself recognizes the right of the trial court to award alimony to an innocent wife "during her life or for a shorter period as the court may deem just". Section 139, Civ.Code.

[2] The trial court had a right to consider the fact that the plaintiff had been self-supporting at the time of her marriage, that she was still relatively young and that

despite her existing incapacity her own physician expected her to be sufficiently recovered in not less than four months nor more than one year to be able to assume some gainful employment. In allowing her alimony for two years we must assume that the trial judge concluded from all the testimony that at the end of two years the plaintiff would be restored to health and reestablished in a gainful occupation.

[3, 4] That the members of this court might have been more liberal is not the test. The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did. Fillmore v. Fillmore, 74 Cal.App.2d 418, 168 P.2d 725; Cozzi v. Cozzi, 81 Cal.App.2d 229, 183 P.2d 739; Furniss v. Furniss, 75 Cal.App.2d 138, 170 P.2d 486.

[5] Appellant cites cases from other jurisdictions which we do not find it necessary to discuss. Under the established law of this state we cannot hold on the facts that the trial judge abused his discretion in limiting the award of alimony.

[6-8] The decree allowed $2,000 as counsel fees to the attorney who tried the case and $500 to another attorney who drew the complaint. The award of $2,000 was in addition to $200 awarded previously. The case took about 7 days to try and must have entailed considerable work in preparation. We are asked to hold that $2,200 is so small an allowance for this work as to demonstrate an abuse of discretion. We cannot agree with this. The determination is primarily for the trial court, Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693; Biaggi v. Sawyer, 75 Cal.App.2d 105, 170 P.2d 678; Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110, and we are not convinced that any abuse of discretion appears herein. Appellant cites cases upholding awards of larger fees under similar circumstances. They are not controlling since they do not hold that the awarding of a smaller fee would have been an abuse of discretion. Considerable leeway must be allowed to judicial discretion in fixing attorney's fees since it is common knowledge that legal charges are far from being standardized.

[9] The allowance of $500 for counsel fees to prosecute the appeal falls in the same category. We cannot find that the failure to allow more constituted the clear abuse of judicial discretion which would warrant a reversal.

[10] Finally appellant complains that no allowance was made for costs except $100 for plaintiff's medical witness. Appellant points out that witnesses appeared from various parts of the United States and argues that their expenses must have been considerable. Appellant is in no position to urge the matter since no showing of actual costs or the amounts thereof was made.

Decree and order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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95 Cal.App.2d 60

LEWIS et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 7713.

District Court of Appeal, Third District, California.

Dec. 12, 1949.

Hearing Denied Feb. 8, 1950.

Action by Delsia Luper Lewis, on her own behalf and as guardian ad litem of her three minor children, against Pacific Gas & Electric Company, to recover for death of husband by electrocution.

The Superior Court for San Joaquin County, R. M. Dunne, J., entered judgment of nonsuit, and plaintiff appealed.

The District Court of Appeal, Peek, J., held that knowledge that sewer line was being laid along street beneath overhead electric line imposed no duty on electric company to warn of high-voltage line so as to render company liable for death of workman electrocuted when crane moving sewer pipe came in contact with line, and affirmed the judgment.

1. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, appellate court must review the evidence in light most favorable to plaintiff.

2. Negligence 🔑2, 56(1.3)

To constitute actionable "negligence", there must be a legal duty to use due care, a breach of such duty and proximate causation between such breach and the injury.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

3. Electricity 🔑14(1)

One who maintains high-voltage electric lines is not bound to anticipate at his peril every possible accident which might occur.

4. Electricity 🔑16(1)

Failure to warn of high-voltage electric line constitutes a breach of duty to use due care if from all the circumstances it could reasonably have been anticipated that an accident of the general nature of that which killed plaintiffs' decedent would occur.

5. Negligence 🔑10

The duty to use due care is commensurate with and proportionate to the reasonably foreseeable consequences.

6. Electricity 🔑16(5)

Knowledge that sewer line was being laid along street beneath overhead electric line did not impose upon electric company a duty to warn of high-voltage line so as to render company liable, in absence of such warning, for death of workman electrocuted when crane moving sewer pipe came in contact with line, in absence of evidence that electric company knew or should have known that a crane of such type would be used or was customarily used in such work or that it would be used near electric line.

Miller and Kroloff, Jack Miller, Ralph E. Kingston, Stockton, for appellants.

Robert H. Gerdes, John J. Briare, San Francisco, Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent.

PEEK, Justice.

This is an appeal from a judgment of nonsuit entered in an action brought by the plaintiff on her own behalf and as guardian ad litem of her three minor children to recover damages for the alleged wrongful death of Willard Lewis, her husband and father of her children.

The complaint alleged that certain high powered lines of the defendant were so negligently strung, maintained and operated as to cause them to come into contact with a crane upon which decedent was working, thereby causing his death. It was further alleged that defendant had knowledge of the construction project on which decedent was working and of the presence of workmen at said place.

Defendant's answer denied the allegations as to their negligence and alleged that the decedent was contributorily negligent.

At the conclusion of plaintiffs' case the defendant moved for a nonsuit, which motion was granted, and from the judgment entered pursuant thereto plaintiffs have appealed.

[1] Reviewing the evidence, as we must, in the light most favorable to plaintiffs it appears that on the date of the fatal accident decedent was employed as an oiler by the Stockton Construction Company, which firm was then engaged in constructing an underground sewer line for the city of Stockton along Charter Way, a public street. The fatal accident, however, occurred outside the Stockton city limits. By virtue of a franchise defendant, at the time of the accident and for some time prior thereto, maintained a high voltage power line parallel to the southerly edge of Charter Way at a height of approximately 26 feet above the ground. The sewer line also was being laid parallel to the southerly edge of said street. Immediately pre-

ceding the accident decedent was helping to move sections of concrete pipe from a field south of said street to where the excavation was being made for the sewer line. A self propelled crane having a boom of 26 feet was used to move the pipe. Decedent's particular duties were to attach a large hook to each section of pipe, after which the crane would move it to the excavation where decedent would release the hook, and the operation would be repeated as each section of pipe was so moved under the power lines. The fatal accident occurred when the boom, in swinging back toward the field after releasing a section of pipe, struck one of the power lines, electrocuting decedent. Although there were no eye witnesses to the actual electrocution the briefs of both parties state that at the time of the contact decedent still had the hook in his hand. Neither the decedent nor the crane operator had worked on the job prior to that morning and neither knew what voltage the line carried. The crane operator testified that they did not know they were working under a high power line; that they thought at most the line carried only 400 volts since it appeared to them to be a very small line apparently running to a small pump house. No warning signs of any kind were in evidence. The defendant stipulated that it had knowledge that the sewer line was to be installed.

It is appellants' contention that the evidence establishes without contradiction that for several months prior to the time of the fatal accident defendant knew of the construction work; that it knew such work would involve the use of a crane and knew or should have known that the particular crane in actual operation was being so used; that no warning signs were attached to the high power lines, and that such evidence posed a question of fact as to whether or not defendant had violated a duty it owed decedent which violation was the proximate cause of his fatal injury.

[2-5] In Lozano v. Pacific Gas & Electric Co., 70 Cal.App.2d 415, 420, 161 P.2d 74, 77, this court stated that "to constitute actionable negligence three elements must occur: (1) The legal duty to use due care; (2) a breach of that duty, and (3) proximate causation between the breach and the injury." As so used the phrase "legal duty" does not mean that one who maintains high voltage lines must anticipate at his peril every possible accident which might occur. Sweatman v. Los Angeles Gas & Electric Corp., 101 Cal.App. 318, 281 P. 677. However, it does mean that if from all of the circumstances it could reasonably have been anticipated that an accident of the general nature as that which killed decedent herein would occur, then defendant failed in its duty to use proper care by its failure to warn of the high voltage lines. In other words the duty of care is that duty which is commensurate with and proportionate to the reasonably foreseeable consequences.

[6] The record, when examined in the light of such rule, does not sustain appellants' contention. Mere knowledge alone that public improvements are to be made is insufficient. Thus, although it does appear that the defendant had knowledge of the proposed construction of the sewer project, there is nothing in the record indicating that it knew or should have known that a crane of the type then being operated by decedent's employer would be so used, that a crane was customarily used in such construction work or that if a crane were to be employed it would be so used near defendant's power lines.

Appellants in further support of their contention cite and rely upon section 31.1 of Rule 95 of the Public Utilities Commission, which rule is entitled "Design, Construction and Maintenance" of power lines, and among other things places upon the owners and employees of electrical systems the duty to "at all times exercise due care to reduce to a minimum the hazard of accidental injury" to others due to the presence of overhead wires. That section is but another statement of the rule previously enunciated, and since the evidence herein does not disclose that the defendant failed to exercise due care the same result obtains.

In view of the conclusion reached in regard to the absence of a legal duty imposed upon defendant under the circumstances, to warn decedent of the high voltage lines, it becomes unnecessary to consider the question of decedent's contributory negligence arising from the uncontradicted evidence that he had actual knowledge of the presence of the power lines, although unaware of the voltage carried thereby.

From the foregoing it follows that the court did not err in granting the motion for nonsuit.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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94 Cal.App.2d 957

CACCAMO et al. v. SWANSTON et al.

VIGNOLA v. SWANSTON (CACCAMO, Intervener).

Civ. 14090.

District Court of Appeal, First District, Division 1, California.

Dec. 8, 1949.

Rehearing Denied Jan. 7, 1950.

Hearing Denied Feb. 2, 1950.

Joseph Caccamo sued Ruth Swanston and others, for personal injuries arising out of an automobile accident, and Rose Vignola, as surviving widow, sued the same defendants for the death of her husband, Silvio Vignola, Katie Vignola, as mother of Silvio Vignola, filed a complaint in intervention asking damages of both defendant Swanston and plaintiff Caccamo.

The Superior Court for San Mateo County, A. R. Cotton, J., rendered a judgment on a verdict in favor of plaintiff Caccamo, plaintiff Rose Vignola, and plaintiff in intervention, Katie Vignola, and defendant appealed.

The District Court of Appeal, Bray, J., affirmed the judgment, and held that the evidence supported the verdict. The court also found no prejudicial error in the giving of instructions relating to the wife's ownership and consent to the use of the automobile, and found that amendments to the complaint and complaint in intervention to conform to proof were properly allowed. The court further found no reversible error in the admission of evidence.

1. Appeal and error 🔑930(1)

On appeal from judgment entered on verdict, appellate court must resolve conflicts in favor of respondents.

2. Automobiles 🔑192(11)

One who knowingly permits an unfit driver to use his automobile is liable for damages caused by negligent acts of unfit driver in operation thereof. Vehicle Code, § 402.

3. Automobiles 🔑192(4)

In order that husband, if co-owner of an automobile with his wife, lawfully have exclusive possession and usage for a time, wife's permission, express or implied, is necessary. Civ.Code, § 164; Vehicle Code, § 186.

4. Automobiles 🔑192(5)

If an automobile is community property, wife's consent to its use by husband is not required, nor can she prevent his using it, and hence she is not liable for his negligence. Civ.Code, § 164; Vehicle Code, §§ 186, 402.

5. Automobiles 🔑20

Where automobile was originally purchased by husband, and thereafter wife and husband both indorsed ownership certificate on line requiring signature of new legal owners, a presumption arose that wife took part acquired by her as a tenant in common. Civ.Code, § 164; Vehicle Code, § 186.

6. Automobiles 🔑20

Certificate of ownership of automobile is evidence of title although not conclusive on the subject. Vehicle Code, § 186.

7. Automobiles 🔑20

In personal injury and death actions against wife arising out of accident that occurred while automobile was driven by husband, proof that wife and husband together indorsed ownership certificate on line requiring signature of legal owner shifted burden to wife to prove that she was only a legal owner as defined by the Vehicle Code or that property was community property, and that hence she was not liable for negligence of husband. Civ.Code, § 164; Vehicle Code, §§ 66, 67, 186, 402.

8. Automobiles 🔑20

In personal injury and death actions against wife for husband's negligence while driving automobile, court correctly charged that there was no evidence tending to prove wife was merely a legal owner as defined by the Vehicle Code, under evidence that automobile was originally bought by husband and thereafter ownership certificate was indorsed by husband and wife and new certificate issued to both. Vehicle Code, §§ 66, 67, 186, 402.

9. Automobiles 🔑20

In personal injury and death actions against wife for husband's negligence while driving automobile, instructions which were somewhat ambiguous but which in effect stated that under the evidence a presumption arose that wife was owner were properly given, in view of evidence that automobile was bought by husband but thereafter ownership certificate was indorsed by husband and wife and new certificate issued to both. Vehicle Code, §§ 66, 67, 186, 402.

10. Tenancy in common 🔑13

In absence of other evidence, an inference normally would arise, upon proof of co-ownership and use of personalty by one co-owner, that such usage was with consent of absent co-owner.

11. Automobiles 🔑242(6)

In personal injury and death actions against wife for husband's negligence while driving automobile of which wife was allegedly the co-owner, burden of showing that wife gave husband permission to use vehicle was on plaintiffs. Vehicle Code, §§ 186, 402.

12. Automobiles 🔑245(35)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, whether use of automobile by husband while intoxicated was with wife's permission was a question for the jury. Vehicle Code, §§ 66, 67, 186, 402.

13. Trial 🔑295(6)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, instruction in which court discussed question of wife's consent without discussing negligence was not objectionable in view of other instructions and charge that jury should consider all instructions as a whole. Vehicle Code, §§ 186, 402.

14. Trial 🔑228(1), 295(1)

Each instruction need not embody every fact or element essential to sustain or defeat an action, nor cover the entire case; but instructions as a whole need only substantially and correctly cover law applicable to the issues; and if under such construction law has been fairly and correctly presented, judgment will not be reversed on appeal even though instruction is otherwise open to criticism.

15. Automobiles 🔑246(39)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, instruction which removed case from liability limitation of the Vehicle Code was proper under evidence that wife knew husband was intoxicated at time she left him in driver's seat with engine running and thereby impliedly, if not expressly, consented to his using it. Vehicle Code, §§ 186, 402.

16. Pleading 🔑236(3)

Trial court has sound discretion to allow amendments of pleadings during trial in furtherance of justice and to dispose of case on its merits when adverse party is not prejudiced thereby; and court should be liberal in allowing such amendments.

17. Pleading 🔑237(5)

Where personal injury action was brought against wife for husband's negligence while driving automobile allegedly co-owned by wife, and there was proof of consent by wife to use of vehicle, and testimony as to whether vehicle was being used in partnership business of husband and wife at time of accident and as to whether husband was intoxicated within wife's knowledge was admitted without objection, and case was tried on those theories, court could properly permit amendment of complaint to conform to proof. Vehicle Code, §§ 186, 402.

18. Pleading ⚷237(6)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, wherein complaint in intervention alleged that one plaintiff was intoxicated while driving second automobile with reckless disregard of consequences, permitting plaintiff in intervention to amend complaint and allege that plaintiff and husband concurrently and negligently caused accident was proper in view of absence of evidence of intoxication or reckless driving by plaintiff. Vehicle Code, §§ 186, 402.

19. Evidence ⚷208(6)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, wherein court permitted filing of amended complaint in intervention charging merely that one plaintiff and husband concurrently and negligently caused accident, allegations in original complaint in intervention that plaintiff was driving with wanton and reckless disregard of consequences while intoxicated became, at most, items of evidence to be weighed by the jury. Vehicle Code, §§ 186, 402.

20. Trial ⚷203(1)

Court must give instructions expounding the law upon every reasonable theory of the case finding support in the evidence.

21. Parties ⚷48

Where amended complaint in personal injury action against wife for husband's negligence while driving automobile allegedly co-owned by wife set forth a cause of action based on wife's knowingly giving permission to intoxicated husband to use vehicle, and a cause based on use of automobile in partnership business of husband and wife, and such causes were raised by the evidence, plaintiff in intervention was entitled to recover on causes arising out of the same accident based on same theories even though complaint in intervention did not seek recovery on those theories. Vehicle Code, §§ 186, 402.

22. Automobiles ⚷20

In action by surviving widow of owner of automobile for death of owner, and by driver for personal injuries sustained in head-on collision with second automobile, brought against wife of driver of second automobile for husband's negligence, wherein mother of owner of first automobile filed complaint in intervention against wife of second automobile driver and against driver of first vehicle, evidence supported verdict against the wife who was listed as co-owner of second automobile on ownership certificate. Vehicle Code, §§ 186, 402.

23. Damages ⚷173(1)

In personal injury and death actions, admission of evidence to effect that taxicab business in which one plaintiff was a partner, decreased because of plaintiff's injuries was not error.

24. Appeal and error ⚷1032(2)

Where appellant did not object to question at trial, did not charge on appeal that answer was mentioned in argument to jury, and did not show in what way testimony caused prejudice, admission of testimony was not reversible error.

25. Trial ⚷244(4)

In personal injury and death actions against wife for husband's negligence while driving automobile allegedly co-owned by wife, giving of repetitious instructions concerning co-ownership of husband and wife and partnership between them was not error in view of importance of those elements, and of court's charge that repetition was not to be considered as a special emphasis. Vehicle Code, §§ 186, 402.

26. Automobiles ⚷245(26)

In personal injury and death actions against wife for husband's negligence while driving automobile, whether vehicle was being used by husband and wife as partners and whether husband driving alone was using it in partnership business at time of accident were questions for the jury. Vehicle Code, §§ 186, 402.

27. Appeal and error ⚿1068(3)

Though evidence may not be sufficient to sustain a cause of action or defense to which an instruction applies, a reversal may not be had upon that ground if the evidence as to other causes of action or defenses is sufficient to sustain the verdict.

◆

Hoffman & Draper, San Mateo, for appellants.

Thomas H. Matimore, Nathan C. Coghlan, San Francisco, for respondents.

BRAY, Justice.

Plaintiff Joseph Caccamo sued defendant Ruth Swanston for personal injuries. In a second cause of action plaintiff Rose Vignola as surviving widow sued defendant Ruth for damages for the death of her husband Silvio Vignola. Katie Vignola, mother of Silvio, filed a complaint in intervention asking damages of both defendant Ruth and plaintiff Caccamo. A jury awarded plaintiff Caccamo damages in the sum of $15,000 against defendant Ruth, and plaintiff Rose Vignola and plaintiff in intervention Katie Vignola the sum of $10,000, also against Ruth. The jury found in favor of plaintiff Caccamo as against the charge of negligence in the complaint in intervention. From the judgment entered on these verdicts defendant Ruth appeals.

Principal Question.

The principal question is whether defendant Ruth was a co-owner of the automobile driven by her husband in the accident which caused injury to plaintiff Caccamo and the deaths of Charles Swanston, the husband of Ruth, and of Silvio Vignola.

Facts.

At about 10 p. m. on January 6, 1946, a head-on collision occurred on El Camino Real just inside San Carlos, between a car driven by Charles Swanston, in which he was riding alone, and a car driven by Joseph Caccamo, in which Silvio Vignola, the owner of the car, was riding. Both Charles Swanston and Silvio Vignola were killed in the accident. Plaintiff Caccamo received serious injuries. The car driven by Swanston ran into the Vignola car on Swanston's wrong side of the highway. As defendant makes no contention that the evidence is insufficient to show Swanston's negligence, it is unnecessary to discuss the details of the accident.

[1] Resolving conflicts in favor of plaintiffs, as we are required to do, the evidence shows the following on the question of the ownership of the Swanston car and the consent of Ruth to its being driven by her husband while in an intoxicated condition: Charles and Ruth Swanston were married in 1939. Charles bought the car, an Oldsmobile, in 1943. The certificate of ownership then issued showed Charles as registered owner and General Motors Acceptance Corporation as legal owner. When the finance company was paid off (from what funds does not appear) the "pink slip" was delivered to Charles. Both he and Ruth signed it and sent it to the Department of Motor Vehicles for transfer of ownership. Ruth testified that she could remember no discussion at that time as to why she signed, or as to the way in which the title would be held. The new certificate, dated April 17, 1944, named Charles as registered owner and both Charles and Ruth as legal owners.

About noon Sunday, the day of the accident, Charles and Ruth left home in their car. They stopped at several bars. Charles became intoxicated. They ate dinner and Charles drank some more at a place called Kelly's. They left Kelly's with a Miss Wilson and drove to a place called Pete and Mary's. Ruth stated that she did not want to go in there. The two women got out of the car. Ruth again repeated that she did not want to enter Pete and Mary's and told Charles that he could do what he pleased. The two women walked away, leaving the intoxicated Charles in the car, the motor running. Shortly thereafter the accident happened.

Ownership of Car.

[2-4] There were initially several theories upon which plaintiff might have recovered: (1) Ruth was an owner of the car and was liable for the negligence of Charles, who drove with her consent. Vehicle Code,

§ 402. The jury apparently did not use this basis of liability, since it awarded damages greater than the statute allows. (2) Ruth was liable for the negligence of Charles on an agency basis, since the accident occurred while Charles was engaged in partnership activities. The evidence relating to this theory will be discussed hereafter. (3) Ruth was herself negligent in consenting to the use of the car, of which she was a co-owner, by Charles, who was obviously intoxicated. "* * * one who knowingly permits an unfit driver to use his automobile is liable for damages caused by the negligent acts of the unfit driver in the operation of the car." McCalla v. Grosse, 42 Cal.App.2d 546, 550, 109 P.2d 358, 360; Knight v. Gosselin, 124 Cal.App. 290, 12 P.2d 454 (intoxicated driver). This last theory raises fact issues as to co-ownership and consent, as well as intoxication known to Ruth. If she was a co-owner with her husband, the latter, in order lawfully to have "its exclusive possession and usage for a time, would need [her]permission, express or implied * * *." Krum v. Malloy, 22 Cal.2d 132, 135, 137 P.2d 18, 20. If the car was community property the wife's consent to its use by the husband could not be required nor could she prevent his using it, and therefore she would not be liable for his negligence. Cox v. Kaufman, 77 Cal. App.2d 449, 175 P.2d 260.

In People v. One 1941 Buick Club Coupe, 72 Cal.App.2d 593, 165 P.2d 44, there is language which seems to hold that the consent of a co-owner of an automobile is not required for its use by the other co-owner. However, the court does not attempt to distinguish the ruling to the contrary in Krum v. Malloy, supra, 22 Cal.2d 132, 137 P.2d 18, and many other cases. The Buick case was one involving the forfeiture under the provisions of the Health and Safety Code of an automobile being used by a coowner for the transportation of marihuana, and its ruling on the subject should be confined to matters involving use of the automobile in the narcotic traffic. As said in People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 507–508, 159 P.2d 641, 643: "Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded."

The ruling in the Krum case has been followed and approved in Zaslow v. Kroenert, 29 Cal.2d 541, 176 P.2d 1, decided subsequent to the Buick case.

[5-7] Practically the only evidence of ownership of the car was the certificate of registration which gave Charles and Ruth as "legal owners." They were not the "legal owners" mentioned in section 67 of the Vehicle Code which defines "legal owner" as "a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle," etc. They were, however, the owners. Section 66 of the Vehicle Code describes the owner as, among others, a "person having all the incidents of ownership, including the legal title of a vehicle". The indicia of title here was the certificate of registration. Section 164 of the Civil Code provides, in part: "* * * whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument", with a certain exception not applicable here. Title passes by endorsement of the certificate and compliance with section 186 of the Vehicle Code. The fact that the car was originally purchased by Charles, and that later Charles and Ruth both endorsed the certificate on line 9 (as to which the certificate states "A new legal owner must sign on line 9") and thereby Charles brought into being an instrument in writing evidencing title in both himself and Ruth, raises a presumption that she took the

part acquired by her as a tenant in common. The certificate is evidence of title, although not conclusive on the subject. No evidence was presented to overcome this presumption. This presumption threw the burden on defendant of proving that she was only the "legal owner" as defined in section 67 or that the property was community property. This defendant made no effort to do, contending that the entire burden was on plaintiffs. Primarily it was, but the burden shifted when the presumption arose.

In Graf v. Harvey, 79 Cal.App.2d 64, 179 P.2d 348, 352, it was stipulated that stockwell, Sr. was the legal owner and that Stockwell, Jr. was the registered owner. The stipulation then set forth that the car was purchased from Stockwell, Jr.'s earnings and that the car was left by him with his father while he was on duty with the Marines. It was further stipulated that Stockwell, Sr. was not the holder of a mortgage on the car or of a contract of sale. The court held that these "stipulated facts were contradictory"; that "The stipulation that Stockwell, Sr. was the legal owner, whatever it might mean, was not a stipulation that he held the legal title or that he was the 'owner' within the meaning" of the Vehicle Code. The reason given was that "a 'legal owner,' namely, a conditional vendor, before he has repossessed the vehicle, or a mortgagee out of possession, is not deemed an owner under the liability provisions of the section." 79 Cal.App.2d p. 70, 179 P.2d page 352. This case is not authority for the proposition, under the facts of the case at bar, that the transfer of the certificate of ownership to the joint names did not prima facie indicate co-ownership.

Instructions on Ownership.

[8] Defendant contends that the court's instructions as to ownership of the automobile were erroneous. Instruction 71 gave the definition of "legal owner" as given in section 67 of the Vehicle Code and then stated that there was no evidence tending to prove that defendant was such "legal owner." Defendant's main objection to this portion of the instruction is that there is no evidence to establish that defendant was not a legal owner. However, the testimony that the car was originally bought by Charles and thereafter the "pink" certificate was endorsed by both and the new certificate issued to both, showed that Ruth was not holding it under any of the conditions set forth in section 67. It is idle to claim that Ruth's statement that she signed the certificate, that she knew the new one was issued in both names, and the fact that she gave no explanation of the reason for the change, was not, at least, some evidence that she was not holding it under a conditional sales contract or as a mortgagee. The instruction was correct.

[9] Instruction 72 stated that according to the certificate, Charles appeared as both registered and legal owner, indicating that both titles had merged in him; that where there is such a merger the word "legal" loses its significance because both the legal and equitable title is consolidated in one person, and that there is no longer a distinction between "legal owner" and "owner"; that it also appeared from the certificate that Ruth was a "legal" owner and that the "same situation applies to her. Unless you should find that she is a 'legal owner' as that term has been defined to you, you must then consider whether she is an owner as that term has been defined in these instructions. If you should find that defendant, Ruth Swanston, is an owner, that she acquired her interest as such in her own name, by an instrument in writing, from her husband, Charles Swanston, then and in that event a presumption arises that her husband conveyed said interest to her as a tenant in common, unless you find that a different intention was expressed in the instrument." In instruction 73 the court stated that a wife could hold property as a tenant in common with her husband. Instructions 74 and 75 then discuss tenancy in common. While these instructions are somewhat ambiguous, the effect of the instructions is that under the evidence a presumption arose that Ruth was an owner. As pointed out heretofore, such statement was correct as a matter of law. There was no error in giving these instructions.

Instructions on Consent.

[10-12] Instruction 76 states that while each owner of an automobile held by tenants in common is entitled to possess and use such property, he may not do so to the exclusion of the other, and if he desires the exclusive use of the automobile he needs the permission, express or implied, of his co-owner. It then goes on to say that if the jury should find that the automobile in question was co-owned by Charles and Ruth, neither would be entitled to its exclusive possession without the consent, express or implied, of the other, and that if the jury should find that Charles did have such permission to drive it, the verdict should be against Ruth. Defendant's objection to this instruction is, first, her claim that there is no evidence of any consent by her to the use of the car by Charles, and secondly, that in some way the court has said that mere possession of the car by one co-owner establishes permission from the other. The court did not so say, and there is nothing in the instruction to support defendant's interpretation of it. The court did not go as far as the law would have permitted it to go, namely, that "In the absence of other evidence upon the issue, an inference normally would arise, upon proof of co-ownership and use of personal property by one co-owner, that such usage was * * * with the consent of the absent co-owner * * *." Krum v. Malloy, supra, 22 Cal.2d 132, 135, 137 P.2d 18, 20. There was evidence to support a finding by the jury of consent. As said in Casey v. Fortune, 78 Cal.App.2d 922, page 923, 179 P.2d 99, page 100, cited by defendant. "The question, however, of whether there was such permission is one to be determined by the trial court upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom." As pointed out by defendant, the burden of showing permission was upon the plaintiffs. Barcus v. Campbell, 90 Cal.App.2d ——, 204 P.2d 65. The evidence shows that defendant left Charles in the driver's seat of the car, with its motor running, and said that he could do what he pleased. This was sufficient to meet the burden.

[13, 14] Instruction 76 must be read in conjunction with all the other instructions in the case, including those on negligence. The court here was discussing the question of consent. The fact that it did not discuss negligence in the same instruction does not invalidate the instruction. The jury was told elsewhere that it was "to consider all the instructions and as a whole, and to regard each in the light of all the others." "It is not necessary that each instruction embody every fact or element essential to sustain or defeat an action or that it cover the entire case. It is sufficient if the instructions, as a whole, substantially and correctly cover the law applicable to the issues. If, under such construction, the law has been fairly and correctly presented, a judgment will not be reversed on appeal even though the instruction is otherwise open to criticism." Megee v. Fasulis, 65 Cal.App.2d 94, 96, 99, 150 P.2d 281, 284.

[15] Instruction 77 removed from the case the liability limitations of Vehicle Code, § 402. The evidence amply shows that at the time defendant left Charles in the driver's seat of the car, with the engine running, and thereby impliedly, if not expressly (she told him he could do what he pleased) consented to his using the car, that he was intoxicated and that she knew that he was intoxicated. The instruction was proper. Knight v. Gosselin, supra, 124 Cal.App. 290, 12 P.2d 454.

Amendment.

[16, 17] The court on the next to the last day of the trial, over the objection of defendant, permitted plaintiffs to file a "Supplemental and Second Amended Complaint," and plaintiff in intervention to amend her complaint. These amendments were permitted to "conform to the proof." While the supplemental complaint is hardly a model of pleading (it states many irrelevant matters), there was no error in the court permitting it to be filed. Defendant contends that there was no proof to which the amendment was to conform; for example, no proof of consent by defendant to the use of the car. Yet, as we have point-

ed out, there was such proof and there was proof on substantially all the matters alleged. Two new causes of action were set up: (1) that defendant and Charles Swanston were engaged in partnership business and that the car, at the time of the accident, was being used in such business; (2) that Charles Swanston was intoxicated and that defendant knew that when she consented to his use of the car. Both of these matters were issues in the case, and evidence had been introduced concerning them. "The rule is well established that the trial court has a sound discretion to allow amendments of pleadings during the trial, in furtherance of justice and to dispose of the case on its merits, when the adverse party is not prejudiced thereby. It has been held the court should be liberal in allowing such amendments." Kroplin v. Huston, 79 Cal.App.2d 332, 340, 179 P.2d 575, 580. Testimony on these two issues was admitted without objection by defendant, and the case was tried upon these theories as well as those in the first amended complaint. No objection was made at any time in the trial court that the statute of limitations had run against these two issues. It is too late to raise it now.

[18, 19] The amendment made by plaintiff in intervention to her complaint is a little confusing. It does not state that the paragraphs set forth in the amendment are to replace any of the paragraphs in the complaint. However, as they are numbered VI, VII, and VIII respectively, we assume they are to replace paragraphs similarly numbered in the complaint. Apparently, the main purpose of the amendment was to eliminate from the original complaint in intervention the allegations to the effect that defendant in intervention Joseph Caccamo was intoxicated at the time of the accident and that he was driving Silvio Vignola's Buick at a time of poor visibility at a speed of over 80 miles an hour with a knowing, intentional, wanton and reckless disregard of the consequences and the life and safety of Silvio. As amended the complaint in intervention merely charged that Joseph Caccamo and Charles Swanston concurrently and negligently drove their respective cars so as to cause the accident. Defendant's first objection is that the allegation in the complaint in intervention that Caccamo was intoxicated and reckless constituted an admission against interest, inasmuch as Silvio Vignola was the owner of the car and as such had a duty to control Caccamo and prevent reckless driving, that such admission entitled defendant to judgment against said plaintiff in intervention and hence should not have been replaced by amendment. Defendant did not move for judgment on the pleadings. In view of the fact that there was no evidence of intoxication of or reckless driving by Caccamo, the allowance of the amendment was well within the discretion of the court. Once having been allowed and made, the situation was as is well expressed in Mallett v. Doherty, 69 Cal.App. 653, 231 P. 1005, where the court said, concerning a similar situation with reference to admissions in an answer, 69 Cal.App. page 655, 231 P. page 1006: "Appellant lays much stress upon the defendant's implied admission in the original answer that he had hindered and prevented plaintiff from exercising his rights under the contract. The admission, of course, was conclusive against the defendant in the original state of the pleadings. But, when the answer was amended so as to deny the alleged hindrance and prevention, the prior implied admission thereof became, at most, a mere item of evidence, the weight of which, in support of plaintiff's allegations, and in contradiction of defendant's positive testimony to the contrary at the trial, was for the determination of the trial court." Here the admissions in the original complaint in intervention became, at most, items of evidence which were to be weighed by the jury in contradiction of positive testimony to the contrary. For the same reason the court properly refused to give an instruction requested by defendant to the effect that because of these admissions the jury must assume that Caccamo was intoxicated and that his intoxication was a proximate cause of the accident. See Lowmiller v. Monroe, etc., 101 Cal.App. 147, 281 P. 433, 282 P. 537.

[20, 21] Defendant contends that in the amended complaint in intervention there is no cause of action based on defendant knowingly giving permission to an intoxicated driver to use the car, nor on the partnership issue. Whether pleaded or not, these were the main issues in the case. They were set forth in plaintiffs' amended complaint and they were raised by the evidence. They come within the rule set forth in Megee v. Fasulis, supra, 65 Cal.App.2d 94, page 101, 150 P.2d page 285, where the court stated: "It was not necessary to have specifically pleaded intoxication as a defense to have warranted an instruction on such question. It is the duty of the court to 'give instructions expounding the law upon every reasonable theory of the case finding support in the evidence.' Raymond v. Hill, 168 Cal. 473, 143 P. 743, 746. It cannot be said that the question of the plaintiff's intoxication was not a part of the case as presented to the jury for determination. The evidence introduced was sufficient to raise such question * * *."

Directed Verdict and Nonsuit.

[22] As shown herein, there was ample evidence to support the verdicts; hence the court did not err in denying defendant's motions for nonsuit and directed verdicts.

Admission of Evidence.

[23] Defendant complains of the admission of certain evidence: first, evidence to the effect that the taxicab business in which plaintiff Caccamo was a partner decreased because of his injuries and inability to participate actively in the management due to the injuries. Her contentions go to the weight of the evidence and not to its admissibility. She cites no authorities holding that the evidence was not admissible. Moreover, there is no claim that the award to plaintiff Caccamo was excessive.

[24] Secondly, during questioning by her own counsel, defendant stated that the partnership had been formed for tax purposes. Thereafter, plaintiffs' counsel questioned her as to the value of the partnership, either at the time of formation or when Charles died, and finally brought out the fact that at Charles' death a half interest in the partnership was worth $62,000. Defendant did not object to the question concerning the value, does not now charge that such fact was mentioned in argument to the jury, and has not shown in what way the testimony caused prejudice. This being so, admission of the testimony cannot be reversible error.

Repeated Instructions.

[25] Defendant contends that the court in its instructions over-emphasized two features of the case, the question concerning co-ownership and the questions concerning partnership. While there was some repetition of instructions on these subjects, it did not go to the extent of over-emphasizing these matters, as was the case in Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533. The question of ownership of the car was an exceedingly important element of the case, and required more than one instruction to bring to the jury all phases of the question. Moreover, the court told the jury, "If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you." There was no error in these instructions.

Partnership.

[26, 27] Charles and Ruth Swanston were copartners doing business as Quick Frozen Packers. Ruth testified that the partnership was formed for tax purposes. The Oldsmobile was used by Charles in the business, although not listed as a partnership asset. Another car, a Chevrolet, was driven by Ruth. Both partners received an expense allowance from the partnership for the use of the respective cars. The only evidence that the car was being used that Sunday on partnership business was that of a witness who testified that as they sat in one of the bars that day Charles and Ruth were discussing breaking up the partnership as they were contemplating divorce, and that "they were discussing the settlement of the business all afternoon, off and on." Ruth denied that at that time

she was contemplating divorce but could not remember whether that afternoon they discussed partnership matters. The court left to the jury by proper instructions the question of whether the Oldsmobile was partnership property and was being used in partnership business. The evidence would support an inference that the car was a partnership car. Whether a car being used by the partners for an afternoon's drinking at which the settlement of their partnership business is discussed "all afternoon, off and on," is being used in partnership business is a question of fact for the jury. In any event, the evidence well supports the verdicts of the jury on the other phase of the case. "* * * even though the evidence may not be sufficient to sustain a cause of action or defense to which an instruction applies, a reversal may not be had upon that ground if the evidence as to other causes of action or defenses is sufficient to sustain the verdict." Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 228, 282 P. 1009, 1012.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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95 Cal.App.2d 69

PACIFIC ELECTRIC RY. CO. v. DEWEY.

Civ. 17284.

District Court of Appeal, Second District,
Division 2, California.
Dec. 13, 1949.

Action by the Pacific Electric Railway Company against Harold A. Dewey to determine the right of the defendant as plaintiff in a personal injury action against the railroad to maintain suit after execution of release for injuries sustained in course of employment.

The Superior Court, Los Angeles County, Jesse J. Frampton, J., sustained a demurrer to plaintiff's complaint for declaratory relief without leave to amend, and the plaintiff appealed.

The District Court of Appeal, Wilson, J., held that fact that on a trial of the action for damages, plaintiff would have to introduce in evidence release signed by the defendant, and thereby disclose to the jury the fact that a compromise had been made was not sufficient to overcome the rule that declaratory relief is unavailable for the determination of issues involved in pending action or to prevent such issues from being presented to a jury, and affirmed the judgment.

1. Declaratory judgment 🔑5, 394

The entertainment of an action for declaratory relief is within the discretionary power of the court and is not reviewable upon appeal except for an abuse of discretion. Code Civ.Proc. § 1061.

2. Declaratory judgment 🔑5, 41

Permission to resort to declaratory relief is a matter of sound discretion of the court, and such action is unnecessary where an adequate remedy exists under some other form of action, and was never intended to afford a sanctuary of escape from trying issues before a jury. Code Civ.Proc. § 1061.

3. Appeal and error 🔑1062(3)

Withdrawal from jury of question of validity of a release executed by employee asserting rights under Federal Employers' Liability Act would constitute reversible error. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Abatement and revival 🔑4

The court abuses its discretion when it assumes jurisdiction where another action or proceeding is pending between the same parties and involving the same issues, since an action cannot be maintained between the same parties to restrict the prosecution of a pending action in the same court unless it is manifest that full justice cannot be obtained in the first action. Code Civ.Proc. § 1061.

5. Declaratory judgment 🔑143

Railroad could not maintain independent action for declaratory relief to determine whether release, executed by employee, precluded employee from maintaining pending personal injury action under Federal Employers' Liability Act against railroad, since effect of release and all matters pertaining to it were proper matters for jury determination. Code Civ. Proc. § 1061; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

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C. W. Cornell, O. O. Collins, John R. Allport, Los Angeles, for appellant.

Reuel L. Olson, Charles R. Martin, San Marino, for respondent.

WILSON, Justice.

The sole question for decision is whether a defendant in a personal injury case may maintain an independent action for declaratory relief pursuant to section 1060[1] of the Code of Civil Procedure to determine the right of the plaintiff in the first action to prosecute it to judgment.

Plaintiff appeals from the judgment entered against it following the sustaining of a demurrer to a complaint for declaratory relief without leave to amend.

The facts alleged in the complaint are as follows: On October 6, 1945, defendant, while in the employ of plaintiff and acting within the scope and course of his employment, sustained personal injuries. He agreed to and did accept $13,080 in full settlement of his injuries and damages and on July 20, 1946, executed and delivered to plaintiff a release of all his claims resulting from the accident; on October 5, 1948, defendant filed an action in the superior court against plaintiff under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover for his injuries alleged to have been sustained in the same accident. He did not offer to return to the railway company the consideration paid for the release. Defendant in that action pleaded as a defense the release and payment of the sum mentioned.

An actual controversy is alleged to exist between the parties with respect to the validity and legal effect of the release, and the railway company prays that the court declare the release to be valid and that an injunction issue restraining defendant from prosecuting his pending action for the recovery of damages.

[1-4] The entertainment of an action for declaratory relief is within the discretionary power of the court (Code Civ.Proc. sec. 1061[2] and is not reviewable upon appeal except for an abuse of discretion. Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326; certiorari denied, 280 U.S. 556, 50 S.Ct. 16, 74 L.Ed. 611. Permission to resort to declaratory relief is a matter of sound discretion of the court. Such an action is usually unnecessary where an adequate remedy exists under some other form of action, Bareham v. City of Rochester, 246 N.Y. 140, 158 N.E. 51, 52; James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401, 404; Newburger v. Lubell, 257 N.Y. 383, 178 N.E. 669, and was never intended to afford a sanctuary of escape from trying issues before a jury. Utica Mut. Ins. Co. v. Beers Chevrolet Co., 250 App.

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[1] "Sec. 1060. [Declaratory relief.] Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

[2] "Sec. 1061. [Power not exercised when.] The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

Div. 348, 294 N.Y.S. 82, 86. The facts and circumstances with reference to the accident and the character of the place at which defendant was required to work and the appliances furnished to him by plaintiff are matters to be weighed and appraised by the jury and a right to a trial by jury is a part of the remedy afforded under the Federal Employers' Liability Act. Bailey v. Central Vermont Ry., 319 U.S. 350, 353-354, 63 S.Ct. 1062, 87 L.Ed. 1444, 1447-1448. The withdrawal from the jury of the question of validity of a release and whether it was executed under mutual mistake of fact is error. Callen v. Pennsylvania R. Co., 332 U.S. 625, 628, 68 S.Ct. 296, 92 L.Ed. 242, 245. The court abuses its discretion when it assumes jurisdiction where another action or proceeding is pending between the same parties and involving the same issues, since an action cannot be maintained between the same parties to restrict the prosecution of a pending action in the same court unless it is manifest that full justice cannot be obtained in the first action. Colson v. Pelgram, 259 N.Y. 370, 182 N.E. 19, 21.

[5] Applying the foregoing rules, it is clear that the instant action cannot be maintained. It appears from the complaint that the release of defendant's claim for damages has been pleaded by the railway company in the previous action brought by defendant against the company. The effect of the release and all questions relating to it are proper matters to be determined by a jury when the action previously filed is brought to trial.

The cases upon which plaintiff relies are inapplicable. In Union Pacific R. Co. v. Zimmer, 87 Cal.App.2d 524, 197 P.2d 363, the right to maintain the action for declaration of rights under a release was not questioned and the injured person had not commenced a suit for damages before the action for declaratory relief was filed but had merely tendered repayment of the amount he had received when the release was executed. In Zayatz v. Southern Ry. Co., 248 Ala. 137, 26 So.2d 545, 167 A.L.R. 426, the injured employee had not commenced an action. The railway company had been notified that the employee desired to repudiate and to rescind his release and the company had been threatened with an action for damages on account of the injuries for which the release had been given. No suit was pending at the time the declaratory relief action was filed in which the rights of the parties under the release could have been litigated. In Auto Mutual Indemnity Co. v. Moore, 235 Ala. 426, 179 So. 368, an action had been filed to recover for personal injuries under an insurance policy and a declaratory judgment was sought determining the rights of the parties under the policy with respect to the cause and claims for damages. The court held that the declaratory action could not be maintained, citing Borchard on Declaratory Judgments to the effect that the first court which became seized of the issues involved, if identical, must be permitted to retain jurisdiction of the case. In the cases of Ermolieff v. R. K. O. Radio Pictures, Inc., 19 Cal.2d 543, 122 P.2d 3, and Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, it was held that the court is not deprived of jurisdiction to make a binding determination of the rights of the parties by the fact that the contract in question had already been breached and the cause of action had arisen. But in those cases no prior actions had been commenced on the contracts, suits for declaratory relief having been the first to be filed.

Plaintiff contends that upon a trial of the action for damages it must of necessity introduce in evidence the release signed by Dewey and thereby will disclose to the jury the fact that a compromise had been made, which may act adversely to the railway company's defense. Such fact is not sufficient to overcome the rule that declaratory relief is unavailable for the determination of issues involved in an already pending action or to prevent such issues from being presented to a jury. Moreover, it is not infrequent that a release of a cause of action for damages is placed before a jury for some purpose. Its effect may be covered by proper instructions.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

In re KEARNS' ESTATE.

MALLARINO et al. v. HAMMERSMITH.

Civ. 13860.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1949.

As Amended on Denial of Rehearing Jan. 12, 1950.

Hearing Granted Feb. 8, 1950.*

Proceeding in the matter of the estate of George Anthony Kearns by Marjorie Mallarino and Lois Graham against Emma Traung Hammersmith, executrix for an instruction to the executrix that a certain clause of the will created a trust in favor of the plaintiffs.

The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered an order instructing the executrix and the words of decedent's will were precatory and did not create a trust in favor of plaintiffs and the plaintiffs appealed.

The District Court of Appeal, Dooling, J., held that the words "I hereby direct my executor to provide for my nieces" "as her judgment, kindness and honesty sees fit to do" created a binding obligation on the executrix to make such provision for the plaintiffs out of the property left to her and reversed the order.

1. Wills ⚷684(10)

No objection can be taken to a trust on the ground that the amount to be applied to the beneficiaries' use is confided to the discretion of the trustee.

2. Wills ⚷467

The word "direct" used in clause of will, prima facie imports command rather than a mere request and use of adverb "hereby" adds further force to direction.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Direct".

3. Wills ⚷467

Ordinarily, precatory words addressed to an executor or executrix are construed as mandatory.

4. Wills ⚷675, 684(10)

Where will provided I hereby direct my executor to provide for my nieces as her judgment, kindness and honesty sees fit to do, and likewise to provide for any other kin or close friend which in her judgment warrants same, words created trust in favor of named parties and created a binding obligation on executrix to make such provision for named persons out of property left to her as her discretion, measured by her judgment, honesty, and kindness, dictated.

◆

Elmer P. Delany, San Francisco, William A. Sullivan, Martin J. Jarvis and Richard O. Graw, San Francisco, of counsel, attys. for appellants.

Marshall E. Leahy, John F. O'Dea, San Francisco, attys. for respondent Emma Traung Hammersmith, as Exr'x.

Philip S. Ehrlich, R. J. Hecht, San Francisco, attys. for respondent Emma Traung Hammersmith, as sole Devisee and legatee.

DOOLING, Justice.

This is an appeal by Marjorie Mallarino and Lois Graham from an order of the probate court granting instructions to the executrix of the will of appellants' uncle that the words of clause 5 of the will are precatory only and do not create a trust in favor of appellants. The will is holographic. In clause 1 it bequeaths "to my beloved and devoted fiance' Emma Traung Hammersmith * * * all my real and personal property". In clause 2 it appoints Emma Traung Hammersmith "executor" without bond. Clauses 3, 4 and 5 read as follows:

"3—I hereby bequeath to my brother, William L. Kearns $1.00 also to my niece Mrs. Marjorie Mallarino G. A. K. $1.00 and my niece Mrs. Lois Graham $1.00 and should any or either of them contest this will it shall avail them nothing.

"4—I hereby direct my Executor, Emma Traung Hammersmith to provide for my brother William L. Kearns, during his life and I depend entirely on her judgment, kindness, honesty and generosity to act as his provider in illness and in health.

"5—I hereby direct my Executor Emma Traung Hammersmith to provide for my nieces Mrs. Marjorie Mallarino and Mrs. Lois Graham as her judgment, kindness and honesty sees fit to do, and likewise to provide for any other kin or close friend which in her judgment warrants same."

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* Subsequent opinion 225 P.2d 218.

The brother, William L. Kearns, is dead and the provisions of clause 4 need not be construed except insofar as they may throw light on the proper construction of clause 5.

[1] It is the contention of appellants that clause 5 creates a trust in their favor and that the determination of the probate court to the contrary should accordingly be reversed. In determining whether a trust was created the fact that the amounts to be "provided for" appellants are not specified but are left to the determination of the executrix "as her judgment, kindness and honesty sees fit to do" is not conclusive against the creation of a trust. "It appears to be definitely established that no objection can be taken to a trust on the score that the amount to be applied to the beneficiary's use is thus confided to the discretion of the trustees." 26 Cal.Jur. 975; 25 Cal.Jur. 319; Estate of Marre, 18 Cal.2d 184, 114 P.2d 591; Estate of Smith, 23 Cal.App.2d 383, 73 P.2d 239; Estate of Davis, 13 Cal.App.2d 64, 56 P.2d 584.

[2-4] Keeping this rule in mind the construction of clause 5 presents no great difficulty. If clause 5 read "I hereby direct my executor to provide for my nieces Mrs. Mallarino and Mrs. Graham $5 per month apiece" no doubt would exist that a trust had been created. The word "direct" prima facie imports a command rather than a mere request. Estate of Farelly, 214 Cal. 199, 205, 4 P.2d 948; Collister v. Fassit, 7 App. Div. 20, 39 N.Y.S. 800, 801. The use of the adverb "hereby" adds further force to the direction. Chambers v. Sharp, 61 N.J.Eq. 253, 48 A. 222, 224. The direction is addressed to "my executor" and even precatory words addressed to an executor or executrix are ordinarily construed as mandatory. Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893; Estate of Pfoor, 144 Cal. 121, 128, 77 P. 825; Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; Estate of Miles, 72 Cal.App.2d 336, 343, 164 P.2d 546. The further fact appears that the direction is set up in a separately numbered paragraph and thereby given equal dignity with the admittedly dispositive clauses. The meaning of the words "provide for" in clause 5 is clarified by reference to clause 4, wherein the executrix is directed to provide for the brother "during his life * * * in illness and in health."

The fact that in clause 3 each of appellants is given one dollar with the caution "should any or either of them contest this will it shall avail them nothing" does not militate against the creation of a trust for their benefit by clause 5. Such a trust, discretionary as to amount with the trustee "as her judgment, kindness and honesty sees fit," is obviously less valuable than the interest of an heir if the will were successfully contested.

Respondent relies upon the rule announced in Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245, and other cases that when an absolute estate has been created in one clause of a will it will not be cut down by subsequent words except such as indicate as clear an intention. The direction to my "executor" to provide for my nieces is as clear as language can be. The fact that the amount is left to the discretion of the trustee does not, under the cases first cited, make the direction less clear. See, for example, Estate of Davis, supra, 13 Cal.App.2d 64, 56 P.2d 584, where the holographic will provided: "I hereby leave all of my property to my son William * * * to be distributed to my sons & grandchildren as he deems best * * *"; and cf. Mackenzie v. Los Angeles Trust & Savings Bk., 39 Cal.App. 247, 251-252, 178 P. 557, holding indefiniteness of a provision for payment of income not to invalidate the trust for uncertainty and declaring that an expression to the contrary in Estate of Sanford, 136 Cal. 97, 68 P. 494, must be held either to have been dicta or to have been overruled by later decisions.

The fact adverted to by appellant, that the last portion of clause 5 is plainly precatory, viz.: "and likewise to provide for any other kin or close friend which in her judgment warrants same", only shows the contrast with the direction "to provide for (absolutely) my nieces * * * as (not if) her judgment, kindness and honesty sees fit." "No will has a brother" Meeker v. Draffen, 201 N.Y. 205, 94 N.E. 626, 628, 33 L.R.A.,N.S., 816 Ann.Cas.1912A, 930, and we must construe the particular will before us. It seems clear to us that the testator intended to create a binding obligation upon his executrix to make such provision for appellants out of the property left to her as her discretion measured by "her judgment, honesty and kindness" dictate. This gives her a wide discretion, but still subject to the control of the probate court in case of a plain abuse. Estate of Marre, supra, 18 Cal.2d 184, 190, 114 P.2d 586.

The order appealed from is reversed.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 51

WILSON v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al.

Civ. 17213.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1949.

H. J. Wilson filed a petition for a writ of certiorari to review the action of the Los Angeles County Civil Service Commission, Charles C. Mack, and others, in including the name of a certain person on the eligible list for the position of county clerk.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., denied the petition, and petitioner appealed.

The District Court of Appeal, McComb, J., affirmed the order and held that the petition failed to state a cause of action.

1. Administrative law and procedure 🔑725
Officers 🔑11

Where fact finding powers are conferred on a civil service commission, its determination will not be set aside unless it is alleged and proved that the board acted arbitrarily, capriciously or fraudulently.

2. Administrative law and procedure 🔑725
Officers 🔑11.4

Petition for writ of certiorari to review action of civil service commission in including name of a certain person on the eligible list for the position of county clerk, which did not allege that the board acted arbitrarily, capriciously, or fraudulently, was insufficient.

Harmel L. Pratt, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondents.

McCOMB, Justice.

From an order denying a petition for a writ of certiorari, petitioner appeals.

Facts: Petitioner alleged that respondents did not meet the necessary legal requirements in giving a promotional examination for Los Angeles County clerk. This petition was denied and a written order was entered to such effect.

The sole question necessary for us to determine is:

Did the petition state a cause of action?

[1] This question must be answered in the negative and is governed by this rule: Where fact finding powers are conferred on a civil service commission, its determination will not be set aside unless it is (1) alleged and (2) proved that the board acted (a) arbitrarily, (b) capriciously, or (c) fraudulently. (Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 59, 110 P.2d 513, and cases cited therein.)

In the instant case the nearest to a compliance with the foregoing rule was this allegation of the petition: "That the Commission denied the contents of petitioner and permitted W. G. Sharp to participate in said examination, and the proceedings thereunder are included herein by reference as though fully set out."

[2] Clearly such allegation did not meet the requirements of the rule and the petition failed to state a cause of action.

Petitioner also alleges, "That the inclusion of the name of W. G. Sharp on the eligible list for the position of County Clerk is an abuse of discretion and in excess of the powers of the Commission, and therefore unlawful and void." Such allegation is a pure conclusion of law and not a statement of fact and must therefore be disregarded. Therefore the trial court properly denied the application for a writ.

Affirmed.

WILSON, J., concurs.

MOORE, Presiding Justice.

I concur in the judgment of Mr. Justice McComb but think additional reasons in support of the order should be given.

The question for decision is whether the court below abused its discretion in refusing to issue a writ of certiorari to review the action of respondent commission.

The Petition

The facts alleged in the petition are: pursuant to an interdepartmental promotional examination for the position of county clerk duly called by respondents, petitioner filed an application and competed therein. One W. G. Sharp applied and his application was contested by petitioner on the ground that Sharp did not meet the requirements for participation. Such contest was denied by respondents. As a result of the examination, an eligible list for the position of county clerk was promulgated. Petitioner's appeal to the commission from the eligible list which was denied referred to the right of Sharp to have his name included on the eligible list and the right of the commission to include it. The list so promulgated includes the name of Sharp who had not worked at least six months including a probationary period in a permanent position to which appointment was made on a permanent basis from an eligible list promulgated in the manner provided by the charter of Los Angeles county nor does the said Sharp meet the requirements set by the commission for participation in the examination for the position of county clerk. Sharp has been acting as county clerk under a temporary appointment, the tenure of which does not qualify him for participation in an interdepartmental promotional examination, but from July 1, 1946, to October 5, 1948 Sharp has acted as executive assistant to the county clerk under an appointment contrary to the county charter respecting eligible lists and appointments in the county's classified service. At all times prior to the appointment of Sharp as executive assistant to the county clerk, he did not hold an appointment in the classified county service in any position for which the salary was greater than $186 per month. The inclusion of his name on the eligible list for county clerk is an abuse of discretion and in excess of the powers of the commission. The eligible list established by the commission for the position of county clerk does not set forth the names of the successful candidates in the order of their standing in examination, but sets forth their names in an order different from their standing in examination by the inclusion with such standing an arbitrary and unlawful credit for efficiency and seniority. While petitioner stood third in the order of standing in examination with a weighted average of 73.94% with Harry J. Ostly and Garrett R. Breckenridge with weighted averages of 77.04% and 74.65% respectively, the commission arbitrarily added to the weighted average of each candidate in examination certain subjective credits for efficiency and seniority, determined without lawful authority or standards, varying from 6.15% in the case of petitioner to 9.65% in the case of Garrett Breckenridge. By reason of such arbitrary credits the commission exceeded its jurisdiction and abused its discretion. Petitioner's appeal from the examination on the promulgated eligible list was denied by the commission March 9, 1949.

Neither answer nor demurrer to the petition was filed. However, pursuant to section 1107 of the Code of Civil Procedure respondents duly filed points and authorities in opposition to the granting of the writ. The statements contained in such document will be considered as a general demurrer. It appears (1) that an action is pending in the court below wherein it was alleged that the examination given prior to April, 1948, was void; that a peremptory writ of mandate was issued on October 5, 1948, to the commission to give a new examination for the office of county clerk and to advise the court on March 1, 1949, how it had executed the writ. It directed the commission to hold a new, competitive examination for that office. On March 1, 1949, respondents filed their return to such writ showing that the old list had been cancelled, that a new competitive examination had been ordered, and given, and that it was completed by February 1, 1949, in conformance with the county charter. In such return they alleged that appeals had been taken from the judgment of October 5, 1948, and prayed that the matter be continued until after the termination of the appeals. When the return on the writ was presented on March 1, 1949, the matter was continued to September 1, 1949. Such proceeding is now pending. The examination commanded in the judgment of October 5, 1948, is the same civil service examination as that referred to in the petition involved in this appeal and may be challenged in that proceeding. Code Civ.Proc., secs. 430[3], 433, 597, 1049; 1 Cal.Jur., pp. 23-38, Abatement, secs. 4-17.

The objections to the issuance of a writ show also that W. G. Sharp is a necessary party and that without him a valid judgment cannot be entered. Bank of California, Nat. Ass'n v. Superior Court, 16 Cal. 2d 516, 521, 106 P.2d 879. Furthermore, the several allegations with respect (1) to the time Sharp had worked, (2) to his meeting the requirements of the commission, (3) to his appointment as executive assistant, (4) to the characterization of the "credit for efficiency and seniority as arbitrary," are mere legal conclusions.

The petition is defective also in that it alleges substantially that the commission wrongfully decided that Sharp possessed the requisite qualifications. Making an erroneous decision is not the equivalent of saying that the board exceeded its jurisdiction. This court has no authority to interfere with the judgment of administrative boards because the judgments of the latter might fairly have been otherwise. Such boards are vested with a broad discretion, the conclusions of which may not be upset unless an abuse clearly appears. Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869. The acts of respondents in holding the examination complained of and in declaring the percentages earned by the several candidates were acts strictly within the jurisdiction of the commission and, in the absence of a showing of fraud, cannot be reviewed. Cook v. Civil Service Commission, 160 Cal. 589, 596, 117 P. 663.

The petition alleges the requirements for eligibility to take the examination to be as follows: "Experience: At least 5 years' as the head of a County Department or a major division thereof or 5 years' equivalent staff or operating experience in the County Service. Completion of courses in law or administration is desirable * *" An allegation of error in judgment is an attack upon the quasi-judicial determination of the commission which was that Sharp had enjoyed the necessary experience to qualify for the examination. In the absence of allegations of facts showing that respondents acted arbitrarily, fraudulently or capriciously in giving the examination or in declaring its results the petition for a writ of review does not state a cause of action. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 55, 59, 110 P.2d 513. Under the Dierssen decision the petition is fatally defective in alleging merely that the commission denied the contests of petitioner, and permitted Sharp to participate in the examination and in attempting to allege the minutes of the commission's proceedings by reference. In the cited case, 43 Cal.App.2d 53, page 63, 110 P.2d 513, the court held that the transcript of the proceedings cannot supply a deficiency in the allegations of the petition.

Another reason for the denial of the writ is the fact that the issues here presented are involved in the matter now pending in the same court. If the judgment entered in that proceeding should be unsatisfactory to petitioner his remedy by appeal will be available.

Clearly the court did not abuse its discretion in refusing to issue the writ.

95 Cal.App.2d 78

PEOPLE v. COATES.

Cr. 2165.

District Court of Appeal, Third District, California.

Dec. 14, 1949.

Thomas V. Coates was convicted in the Superior Court of Shasta County, Albert F. Ross, J., on his plea of guilty to a violation of section 476a of the Pen.Code.

From an order of the Superior Court, Shasta County, Albert F. Ross, J., denying his application for writ of error coram nobis, the defendant appealed.

The District Court of Appeal, Adams, P. J., held that the defendant had failed to exercise due diligence in making his application and had also failed to establish the grounds of his petition, and affirmed the order.

1. Criminal law 🔑997

Writ of error coram nobis is a remedy of narrow scope, purpose of which is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court.

2. Criminal law 🔑997

Applicant for writ of error coram nobis must show that the facts upon which he relies were not known to him and could not, in the exercise of diligence, have been discovered by him at any time substantially earlier than the time of his motion for the writ.

3. Criminal law 🔑997

Application for writ of error coram nobis on ground that plea of guilty was entered in exchange for probation and that applicant was not given a preliminary hearing or confronted by his accuser was properly denied for want of diligence, where not filed until four years after sentence.

4. Criminal law 🔑245

Invalidity of proceedings prior to commitment is waived by failure of defendant to move to set aside information. Pen. Code, §§ 995, 996.

5. Criminal law 🔑997

In proceeding on application for writ of error coram nobis on ground that plea of guilty had been entered in exchange for probation and that petitioner was not given a preliminary hearing or confronted by his accuser, evidence sustained implied finding that petitioner had not been promised probation in exchange for his plea of guilty, that he was given a preliminary hearing, and that he freely and voluntarily admitted his guilt.

Thomas V. Coates, San Quentin, in pro per.

C. K. Curtright, Sacramento, for appellant.

Fred N. Howser, Attorney General, by Doris H. Maier, Deputy, for respondent.

ADAMS, Presiding Justice.

On May 28, 1945, appellant Coates pleaded guilty to a violation of Section 476a of the Penal Code, and was sentenced to imprisonment for the term prescribed by law. On June 2, 1949, he filed in the Superior Court of Shasta County a petition in the nature of an application for a writ of error coram nobis, contending that the judgment against him should be set aside because his plea of guilty had been entered in exchange for probation, and that he was not given a preliminary hearing or confronted by his accuser. A hearing on said application was held at which Coates was represented by counsel appointed by the court. The application was denied and this appeal is from that denial.

[1, 2] In the recent case of People v. Adamson, 34 Cal.2d 320, 210 P.2d 13, the limitations of review by way of writ of error coram nobis were defined, the court saying that it is a remedy of narrow scope the purpose of which is to secure relief where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it, and which, through no negligence or fault of defendant, was not then known to the court; and that an applicant for the writ must show that the facts upon which he relies were not known to him and could not, in the exercise of due diligence, have been discovered by him at any time substantially earlier than the time of his motion for the writ.

[3, 4] Examining appellant's contentions in the light of that decision it is obvious that he has not shown due or any diligence in presenting the facts upon which he relies, since over four years elapsed after his plea was entered before this petition was filed. It is equally obvious that such facts were known to him at the time he was sentenced, for if, as he contends, his plea of guilty was entered because he was promised probation in exchange therefor, he knew that, and he likewise knew whether or not he was given a preliminary hearing and confronted by his accuser. So, even if there were merit in his claim that his plea was induced by promise of probation (which, in fact, he does not allege), or if he was not given a preliminary hearing before a magistrate or justice of the peace, he is not entitled to a reversal of the judgment of conviction in this proceeding. In Re Tedford, 31 Cal.2d 693, 694, 192 P.2d 3, the Supreme Court said that any invalidity of proceedings prior to commitment were deemed waived by failure of defendant to move to set aside the information. To the same effect are People v. Middleton, 103 Cal.App. 135, 138, 283 P. 976 (hearing in Sup.Ct. denied and petition for certiorari to the U.S.Sup.Ct. denied, 281 U.S. 739, 50 S.Ct. 349, 74 L.Ed. 1153); Application of Dorsey, 81 Cal.App.2d 584, 586, 184 P.2d 702; In re Rogers, 91 Cal.App.2d 394, 205 P.2d 667; Pen.Code, secs. 995, 996.

The record before us further shows that at the hearing, at which he was represented by counsel, petitioner's claim that he was offered probation in exchange for a plea of guilty was not proven. In fact he admitted that no such offer was made nor promise given. He merely inferred from the friendly manner of the district attorney that if he entered such a plea he would be given such consideration. The making of any such offer or promise was specifically denied by the district attorney. Also at such hearing there was some evidence that a preliminary hearing on the original charge was had. There is evidence that a complaint was regularly sworn to before a magistrate, and the magistrate's docket recites that defendant was brought into court and arraigned, that the complaint was read to him, that he was informed of his legal rights, and that a preliminary hearing was had and witnesses sworn and examined for the prosecution, that defendant admitted the violation, also the issuance of other worthless checks, and that he was held to answer to the Superior Court.

The magistrate could not recall where that hearing was held. He said he had no independent recollection of the proceedings, but did remember the case; that the hearing might possibly have been held in the sheriff's office, which was the recollection of the district attorney. There is also evidence that prior to that hearing defendant had made a statement to the district attorney in which he admitted the charge; that said statement was taken down by a stenographer and written up. Petitioner admitted that he was present before the magistrate but he testified that the magistrate did not say a word to him—that he only signed some papers. As a witness in this proceeding petitioner admitted that he had told the district attorney that he not only had given the check in controversy, but had previously given other checks without sufficient funds and when he had no account. He admitted that at the time of sentence, and the record shows, that defendant was asked if he had any legal cause to show why judgment should not be pronounced, and he said he had none.

[5] We have reviewed the record before the trial court on this proceeding. It contains sufficient evidence to sustain the implied finding of the court that defendant was never promised probation in exchange for his plea of guilty, that he was given a preliminary hearing, that he freely and voluntarily admitted his guilt of the crime charged and of other similar offenses, and that his asserted grounds for issuance of the writ of error coram nobis were not established. Therefore, since the alleged grounds for setting aside the judgment of conviction are insufficient as matter of law, and were impliedly found to be untrue as matter of fact, the order appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

95 Cal.App.2d 41

LEITE v. DIETZ.

Civ. 14134.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1949.

A. J. Leite brought action against J. Louis Dietz, to recover on a note which the defendant had given to the plaintiff's assignor for amount of money loaned by the assignor to defendant to pay gambling debt owed by defendant to assignor's husband.

The Superior Court for the city and county of San Francisco, Theresa Meikle, J., rendered judgment for defendant, and plaintiff appealed. On death of defendant, Samuel Dietz, as executor of the estate of J. Louis Dietz, deceased, was substituted as defendant.

The District Court of Appeal, Nourse, P. J., affirmed the judgment, holding that there could be no recovery on the note because of knowledge of plaintiff's assignor that money loaned was to be used to pay gambling debt.

1. Gaming 🔑18

The lending of money which is subsequently used for purpose of gambling is not illegal if person who advances the money has no knowledge that it is to be used for an unlawful purpose.

2. Gaming 🔑21(1)

Generally, in absence of a special statute to the contrary, one who lends money to another to pay a gambling transaction in which the lender did not participate, may recover the money loaned, where lender has no knowledge of unlawful purpose for which money is borrowed.

3. Appeal and error 🔑994(3)

Determination of the truthfulness of all testimony is the function of the trial court as trier of the facts, and its findings should not be disturbed on appeal where inferences support it.

4. Gaming 🔑19(3)

Where wife of bookmaker loaned gambler money to pay bookmaker for gambling losses of gambler, and gambler gave bookmaker's wife a note for amount of loan, and bookmaker's wife knew purpose for which money was borrowed, assignee of wife could not recover on the note.

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Joseph A. Brown, San Francisco, attorney for appellant.

Shapro & Rothschild, and Arthur Shapro, San Francisco, Raymond Anixter, San Francisco, of counsel, attorneys for respondent.

NOURSE, Presiding Justice.

Plaintiff sued as assignee of Caroline Trieber upon a promissory note executed by defendant J. Louis Dietz, who deceased after judgment and pending this appeal. The substitution of his executor has been duly made, and we will herein refer to the original defendant as the promisor and to Mrs. Trieber as the promisee.

The facts are not materially disputed. The promisor was engaged in betting on horse races. The husband of the promisee was engaged in placing bets in the manner commonly known as running a "book." The promisor had lost heavily and at the time the note was executed was out $7,500. Mrs. Trieber testified that in June, 1947, she, at the request of her husband, took the sum of $7,500 from her safe deposit vault and gave it to her husband for the purpose of loaning it to the promisor. There was no confirmation of this testimony. The promisor testified that he executed the note at the request of Morris Trieber who then told him that he was having trouble with his wife on account of the debt. He also testified that his losses from betting were then $7500. There is no evidence that the sum was delivered to the maker and no evidence that when the money was loaned by Mrs. Trieber she had any knowledge that it was to be used in gambling or that it was borrowed for the purpose of paying a gambling debt.

[1, 2] If the trial court had believed the testimony of Mrs. Trieber, it would present the single question whether money loaned and used to pay an antecedent gambling debt without the lender's knowledge of the intended use is so tainted with the subsequent use that it may not be recovered. The answer is found in the succinct statement in 24 Am.Jur. p. 463: "Clearly, the lending of money which is subsequently used for the purpose of gambling is not illegal if the person who advances the money has no knowledge that it is to be used for an unlawful purpose. The general rule seems to be that in the absence of a special statute to the contrary, one who lends money to another to pay a gambling transaction in which the lender did not participate may recover the money lent. Such a loan does not fall within the purview of a statute prohibiting recovery of money lent for the purpose of gaming." Authorities are cited in the note uniformly holding that where the lender is without knowledge of the purpose of the loan, recovery can not be defeated by proof that the borrower subsequently used the money in gaming. Other authorities are cited holding that, even though the lender knew the purpose of the loan, he may recover if the money was to be used in paying an antecedent gambling debt. The principle of these cases is that what is inhibited is the furnishing of funds to a gambler to encourage and enable him to engage in a gambling transaction. This principle is stated in Hamilton v. Abadjian, 30 Cal.2d 49, 52, 179 P.2d 804, 806, as follows: "The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his act cannot recover on the check."

The converse of the rule is found in the second part of the Hamilton decision. The owner of the gambling place was also operating a hotel on the same premises. He cashed checks for the defendant at the hotel desk and "no restrictions were placed by the payee upon the use of the money." It was held that the hotel could recover notwithstanding evidence that some of the proceeds was used to pay gambling debts.

The principle of law involved here is that when the payee of a promissory note delivers money to the maker without knowledge of the purpose for which the maker intends to spend the proceeds his recovery on the note cannot be defeated by proof that the maker thereafter used the proceeds for an unlawful purpose. To illustrate, if a bank, in the regular course of its business, loans money to a customer on his promissory note, without knowledge of the customer's intended use of the money, it is no defense to an action on the note that the customer used the money in gambling or in payment of a prior gambling debt.

But this rule applies only in a case where the lender is without knowledge of the illegal purpose of the loan and may not therefore be treated as a party to the gambling transaction. Here the trial court found that the note was given "in settlement of a gambling obligation." The finding is based on the inference that Mrs. Trieber was not unaware of her husband's scheme to clear the gambling debt by a purported loan from her and follows from the trial court's conclusion that Mrs. Trieber's testimony relating to the delivery of the cash as a loan to Dietz could not be believed.

[3, 4] It was the function of the trial court to determine the truthfulness of all the testimony and the finding of no consideration should not be disturbed when reasonable inferences support it.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

95 Cal.App.2d 265

In re MESNER'S ESTATE.

GERSHAN et al. v. CRADICK.

Civ. 17196.

District Court of Appeal, Second District,
Division 1, California.
Dec. 21, 1949.

Proceeding in the matter of the estate of Jennie Mesner, deceased. Harry Gershan and another filed a petition seeking an order directing Charles W. Cradick, executor of the last will of Jennie Mesner, deceased, to return to the petitioners a cashier's check representing a deposit by them in connection with a bid for purchase of real property belonging to estate of the decedent.

An order granting the petition was entered by the Superior Court of Los Angeles County, Harold B. Jeffery, J., and the executor appealed.

The District Court of Appeal, White, P.J., affirmed the order on the grounds that probate court had jurisdiction to enter the order and that order was properly entered without making of findings of fact or requiring petitioner to present evidence in support of their petition.

1. Courts 🔑202(3)

Where issues of fact are joined in contested probate matters, findings thereon are required, but a finding is not required upon a fact stipulated to be true or admitted by the pleadings, or upon an immaterial fact, or any fact not put in issue by the pleadings. Probate Code, § 1230.

2. Executors and administrators 🔑146

Where executor's answer to petition filed to recover cashier's check deposited by petitioners in connection with their bid for purchase of realty belonging to estate of decedent admitted receipt and retention of the check and confirmation of sale to another and higher bidder, no findings were necessary upon such facts, and petitioners were not required to introduce evidence to prove them. Probate Code, § 1230.

3. Executors and administrators 🔑146

Allegations in executor's answer to petition filed to recover cashier's check deposited by unsuccessful bidders in connection with their bid for purchase of realty belonging to estate of decedent that petitioners gave notice of rescission of their bid on ground of fraud prior to confirmation hearing but that court at time of confirmation hearing was not informed thereof, that action of successful bidders in defaulting was had after conference with petitioners, and that executor did not perpetrate any fraud upon petitioners were insufficient as a defense to petitioners' claim for return of their check.

4. Executors and administrators 🔑146

Executor was not entitled to retain cashier's check deposited by unsuccessful bidders in connection with their bid for purchase of realty belonging to estate of decedent after unsuccessful bidders had stopped payment on the check as part of the records of the estate.

5. Executors and administrators 🔑82

The executor of estate of a decedent is an officer of the court and derives his power to act from order of the court, and is subject to supervision and control of the probate court. Probate Code, §§ 780–788.

6. Executors and administrators 🔑146

Probate court had jurisdiction to enter order directing executor of estate of a decedent to return cashier's check deposited with him by unsuccessful bidders in connection with a bid for purchase of realty belonging to decedent's estate. Probate Code, §§ 780–788.

Dailey S. Stafford, Los Angeles, for appellant.

Daniel A. Weber, Beverly Hills, for respondents.

WHITE, Presiding Justice.

The executor of the will of Jennie Mesner appeals from an order of the superior court, sitting in probate, directing him to return to the petitioners and respondents a cashier's check for $8,000, representing a deposit by respondents in connection with their bid for the purchase of real property belonging to the estate of the decedent.

The following facts are undisputed:

About October 25, 1948, respondents submitted a written bid to the executor in the sum of $79,500 and delivered to him the cashier's check in question. On October 28, 1949, the executor filed a return of sale and petition for confirmation with the superior court. Hearing was set for November 15. On November 11, 1948, respondents notified the executor in writing that they rescinded their bid on the grounds of fraud and misrepresentation, and demanded return of the $8,000 deposit. On November 15, 1948, the hearing on the return of sale and petition for confirmation was held. Respondent Harry Gershan, with his counsel, was present in court, but they took no part in the proceedings. Upon the calling of the matter, the executor's attorney stated that he understood a bidder for the property was in court, and upon the court's inquiry, one J. P. Singer bid $83,975. There being no other bidders, the court confirmed a sale to Singer. On this same date, November 15, the executor deposited the $8,000 cashier's check in the estate bank account. The respondents having stopped payment thereon, the check was returned to the executor. Upon his refusal to surrender the check, respondents filed a petition and secured a citation returnable before the probate court requiring the executor to show cause why the check should not be delivered up to respondents. Upon the hearing of the petition the court made the order which is the subject of this appeal.

Appellant executor urges a reversal upon the following grounds: (1) "The court erred in rendering judgment for petitioners (respondents) when they presented no evidence in support of their petition and in not requiring them to do so." (2) "Where findings of fact are required the court cannot render a valid judgment until findings are made and filed with the clerk."

[1] Section 1230 of the Probate Code provides that issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. Where issues of fact are joined in contested probate matters findings are required. In re Estate of Baird, 59 Cal.App.2d 303, 138 P.2d 698; In re Estate of Rosland, 76 Cal.App.2d 709, 173 P.2d 830. However, a finding is not required upon a fact stipulated to be true or admitted by the pleadings, or upon an immaterial fact, or any fact not put in issue by the pleadings, Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626; Crane Co. v. Borwick Trenching Corp., Ltd., 138 Cal.App. 319, 324, 32 P.2d 387; Irer v. Gawn, 99 Cal.App. 17, 23, 277 P. 1053; 24 Cal.Jur. 952; 11A Cal.Jur. 171.

[2] The answer of the executor to the petition filed by respondents admitted the receipt and retention of the check and the confirmation of the sale to another and higher bidder. No findings therefore were necessary upon these facts, and the petitioners were not required to introduce evidence to prove them.

[3] There remains, therefore, the question of whether the new matter contained in the executor's answer to the petition presented any fact or facts material to a determination of whether the cashier's check should be returned to the unsuccessful bidder. It was alleged in the answer that prior to the confirmation hearing the petitioners gave notice of rescission of their bid on the ground of fraud; that the court at the time of the confirmation hearing was not informed of the rescission; that Los Angeles Estate and Realty Company, a broker who was to receive a commission, was the agent of the petitioners; that the Singers, whose bid was accepted in open court, "will default and decline to complete the purchase of said property, and the action

of said bidders in defaulting was had after conference with the petitioners * * *." The executor further alleged that he did not perpetrate any fraud upon petitioners.

These allegations are clearly insufficient as a defense to the claim of the petitioners for a recovery of their deposit or a return of the cashier's check. The trial court ruled, and properly so, that any question of fraud or right of rescission was not before him; that the fact determinative of the cause was the undisputed fact that petitioners' bid had been rejected in open court in favor of a higher bidder. It is stated in appellant's reply brief that pending this appeal the order of confirmation of sale to the Singers has been vacated. This also is immaterial. The determinative point, in our view, is that appellant executor neither alleged nor proved, nor offered to prove, any fact or facts which would justify him in retaining the deposit as a forfeit had he been able to cash the check. He suggested, possibly, but did not allege or offer to prove, collusion between the two bidders.

[4] The suggestion advanced in appellant's reply brief, that the executor is entitled to retain the cashier's check as part of the records of the estate, is patently without merit.

[5, 6] Appellant in his answer to the petition raised the question of the jurisdiction of the probate court to make the order complained of, but has not argued it in his briefs on appeal. The present dispute does not arise out of the ordinary type of claim or demand against the estate of a deceased person, based on transactions with the decedent in his lifetime, but arises out of dealings by the executor in connection with a sale of property of the estate. The sale is subject to the supervision and confirmation of the probate court. Prob.Code, secs. 780–788. The executor is an officer of the court and derives his power to act from the order of the court. County of Los Angeles v. Morrison, 15 Cal.2d 368, 371, 101 P.2d 470, 129 A.L.R. 443. He is subject to the supervision and control of the probate court. See In re Estate of DeBarry, 43 Cal.App.2d 715, 725, 726, 111 P.2d 728; In re Estate of Conkey, 35 Cal.App.2d 581, 585, 96 P.2d 383; In re Estate of Maddalena, 42 Cal.App.2d 12, 19, 108 P.2d 17; 11A Cal.Jur. 77, 78; 11B Cal.Jur. 230. While we are cited to no case precisely on the point, and our research has revealed none, we are of the view that the probate court, with its power of control over the conduct of the executor, had jurisdiction to make the order in question.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

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95 Cal.App.2d 179

COLLINS v. PRIEST.

Civ. 3900.

District Court of Appeal, Fourth District, California.

Dec. 19, 1949.

Hearing Denied Feb. 16, 1950.

Petition by Wesley R. Collins against C. K. Priest, as City Clerk of the City of Newport Beach, a city of the sixth class, to compel the respondent by writ of mandate to grant the petitioner a license to carry on the business of plumbing within the city.

From a judgment of the Superior Court of Orange County, Franklin G. West, J., granting a peremptory writ, the defendant appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment, holding that the petitioner, who held a valid license to carry on the business of plumbing contractor from the state, could not be compelled by the city to pass an examination and obtain a certificate of competency before engaging in his business in the city.

1. Municipal corporations 🔑592(1)

Where the state had provided a comprehensive system for the examination and licensing of all contractors and had occupied the entire field, city of Newport Beach could not provide for additional requirement for a license in the field fully occupied by the statute. Health and Safety Code, §§ 500, 800, 800.5, 801; Business and Professions Code, § 7068.

2. Municipal corporations ⚷592(1)

Where petitioner was holder of valid unrevoked license as a plumbing contractor issued after he had successfully passed an examination required by the Contractors' State License Board of the state pursuant to the statute, the city of Newport Beach could not compel the petitioner to pass an examination and obtain a certificate of competency before engaging in his business in the city. Health and Safety Code, §§ 500, 800, 800.5, 801; Business and Professions Code, § 7068.

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George S. Dennison, Los Angeles, for appellant.

Utt & Hubbard, Santa Ana, for respondent.

MUSSELL, Justice.

On this appeal from the judgment and order granting a peremptory writ of mandate to compel the respondent to issue a license to petitioner to carry on the business of plumbing within the city of Newport Beach, the following facts appear from the agreed statement filed herein. Petitioner was the holder of a valid, unrevoked license as a plumbing contractor issued after he had successfully passed the examination required by the Contractors' State License Board of the State of California pursuant to Chapter 9, Division 3 of the Business and Professions Code. He applied to the appellant city clerk of the city of Newport Beach for a license to carry on the business of plumbing within the city and tendered the necessary fees therefor. The clerk refused to issue such license upon the ground that petitioner had not first submitted to a practical examination before the examining board of plumbers of the city and had not obtained from such board a certificate of competency as required by the provisions of Ordinance No. 379 of said city.

The sole point to be decided upon this appeal is whether the city can compel the petitioner to pass an examination and obtain a certificate of competency before engaging in his business. This question involves a construction of the provisions of the Business and Professions Code relating to the licensing of contractors generally and the provisions of the Health and Safety Code as to the regulation of plumbing within the limits of municipal corporations.

The provisions of the Business and Professions Code involved, which are contained in Division 3, Chapter 9, of the Code, with particular reference to qualification of applicants for contractors' licenses contained in Article 5 of said chapter, require that an applicant for such license shall show "such degree of experience, and such general knowledge of the building, safety, health and lien laws of the State and of the rudimentary administrative principles of the contracting business as the board deems necessary for the safety and protection of the public." § 7068. The applicant is required to be of good character and the manner in which lack of good character may be shown is specifically set forth. It is further provided therein that upon receipt of the fee and an application furnishing complete information in the manner required by the registrar and after such examination and investigation as he may require, the registrar shall issue a license to the applicant permitting him to engage in business as a contractor under the terms of the chapter. The petitioner is a contractor as the term is defined in said statute.

The provisions of the Health and Safety Code upon which appellant relies are all contained in Part 2 of Division 1 of the Code and are Sections 500, 800, 800.5 and 801, and are as follows:

"Section 500. The governing body of a city shall by ordinance adopt for the regulation of sanitary matters in the city such rules and regulations as are necessary and proper, and shall supervise all matters pertaining to the sanitary condition of the city."

"Section 800. The provisions of this chapter shall not apply to any city which has prescribed, or does hereafter prescribe, by ordinance its own system for the licensing of plumbers and the regulation of plumbing within such city by its health or building departments."

"Section 800.5. It is unlawful for any person to carry on business, or labor as a master or journeyman plumber, in any city unless he has obtained from the board of health of the city a license authorizing him to carry on that business, or to labor as such mechanic."

"Section 801. A license shall be issued only after a satisfactory examination by the city board of health of each applicant upon his qualifications to conduct that business or so to labor."

[1] It is apparent that the State of California has provided a comprehensive system for the examination and licensing of all contractors in the provisions noted in the Business and Professions Code and has occupied the entire field, not only as to competency but as to character of applicants for contractors' licenses throughout the state. It follows that the city of Newport Beach may not provide for additional requirements for a license in a field which is fully occupied by the statute. As was said in Pipoly v. Benson, 20 Cal.2d 366, at page 370, 125 P.2d 482 at page 484, 147 A.L.R. 515, "This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is important in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute." (Citing cases.)

In Horwith v. City of Fresno, 74 Cal. App.2d 443, 168 P.2d 767, decided by this court, the City of Fresno had enacted an ordinance requiring electrical contractors to obtain and pay for a business license before engaging in business in the city. The plaintiff applied for such a license but it was refused because he had neglected to pass an examination before the city control board of examiners as required by the ordinance. We there held that the state had adopted a broad and comprehensive plan for licensing contractors throughout the entire state, for examination as to their qualifications and fitness to engage in their various activities, for licensing only those who proved themselves qualified by satisfactorily passing examinations and for punishing those who proved themselves incompetent or unfaithful to the trust imposed in them; that as the licensing of contractors throughout the state is a matter of general and state-wide concern, it is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulation.

In City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32, it was held that a municipal ordinance requiring every contractor, including a painting contractor, to obtain a business certificate or a license before engaging in business was invalid where the ordinance attempted to impose additional requirements in a field occupied by the State Contractors' Law. Bus. & Prof. Code, Sec. 7000 et seq.

Appellant argues that these cases are inapplicable because the provisions of the Health and Safety Code are a part of a comprehensive system provided by the state for the "regulation of plumbing".

[2] Section 500 of the Health and Safety Code provides for the regulation of sanitary matters in cities by ordinances containing necessary and proper rules and regulations. Such regulation is necessary and proper. However, the quantity and character of plumbing installations is not here involved, and to require petitioner to pass an examination in a manner satisfactory to an examining board of plumbers and to require him to obtain a certificate of "competency" is to invade his rights as a contractor granted under the provisions of the Business and Professions Code, Section 7000 et seq.

If the argument of appellant was sound, as was said in Horwith v. City of Fresno, supra, 74 Cal.App.2d at page 447, 168 P.2d 767, there is no reason why a city could not require lawyers, doctors, dentists and others holding state licenses to pass other and more stringent examinations before being permitted to practice therein.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

94 Cal.App.2d 586

ADAMS et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14168.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1949.

Hearing Denied Jan. 5, 1950.

In action by John H. Adams and others, individually and as members of Automotive Machinists Lodge No. 1305, International Association of Machinists, against the City and County of San Francisco, a municipal corporation, and others concerning the rights of plaintiffs to receive a vacation of two calendar weeks and sick leave and disability leave, the District Court of Appeal on an appeal by defendants rendered an opinion, 211 P.2d 368, and thereafter there was filed a petition for rehearing and application for leave to produce additional evidence.

The District Court of Appeal, Ward, J., denied the petition for rehearing and application for leave to produce additional evidence.

Appeal and error ⚷891

Where the District Court of Appeal had rendered an opinion on right of civil service machinist employees of City and County of San Francisco to receive vacation and sick leave and disability leave, petition for a rehearing on ground that charter amendment had repealed certain section of the charter dealing with the subject, and application for leave to produce additional evidence would be denied where the new charter provision would not become effective until January 1, 1951, and could not become effective until approved by the legislature.

Dion R. Holm, City Attorney, William F. Bourne, Deputy City Attorney, San Francisco, for appellants.

Milton Marks, San Francisco, for respondents.

WARD, Justice.

The main point raised for the first time on this petition for rehearing is that this court should determine the legal effect of a charter amendment relating to vacations adopted by the people of San Francisco at an election on November 8, 1949, which purports to repeal the last sentence of section 151 of the Charter of the City and County of San Francisco relating to vacations, and purports to adopt a new section —151.4—dealing with that subject. Petitioner relies on decisions holding that where the judgment affects the rights of the parties in futuro the law in effect when the appellate court renders its opinion, and not the law in effect when the decision was rendered by the trial court, prevails. The rule has no application here. The new charter provision by its express terms does not become effective until January 1, 1951, and hence the cases cited are not in point. Moreover, the amendment, in any event, cannot become effective until and if the Legislature approves.

This court expresses no opinion as to the effect, if any, that the amendment approved November 8, 1949, might have on the problem presented on the petition for rehearing. If there is a difference of opinion over the proper interpretation of this amendment after and if it becomes effective, that problem will have to be left to future litigation.

This court held that sections 151, 151.1 and 151.3 of the charter, as they now read, all relate to the subject of compensation. That would be equally true regardless of how those sections were numbered.

Plaintiffs filed an application for leave to produce additional evidence: (1) a copy of the proposed amendment to the charter and arguments with respect to the amendment, and (2) testimony that the electors voted favorably on the proposed amendment at a recent election.

The application to take additional evidence and the petition for a rehearing are denied.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SHENK, CARTER, and TRAYNOR, JJ., dissenting.

THOMAS v. LYONS et al.

Civ. 7654.

District Court of Appeal, Third District, California.

Dec. 20, 1949.

Rehearing Denied Jan. 18, 1950.

Hearing Granted Feb. 16, 1950.*

Marin Mann Thomas sued Charles B. Lyons and others, and the Ukiah Lumber Mills to quiet title to realty and timber thereon.

The Superior Court for Mendocino County, Lilburn Gibson, J., rendered a judgment for plaintiff, and the corporation appealed.

The District Court of Appeal, Peek J., held that defendant could not assert an alleged modification of the contract or right to relief from an alleged forfeiture for the first time on appeal. The court also held that the evidence was insufficient to sustain a finding that defendant was in default in minimum monthly payments under a contract for sale of the timber, and reversed the judgment.

1. Appeal and error 🔑173(2)

Where complaint alleged execution of contract and defendant's failure to make payment in accordance with terms, and defendant denied breach but did not plead modification of contract, and no issue thereon was raised at trial, defendant could not assert modification on appeal.

2. Appeal and error 🔑882(3)

A party cannot assert a new theory on appeal for the first time.

3. Appeal and error 🔑173(2)

Where complaint alleged execution of contract and defendant's failure to make payments in accordance with terms, and defendant denied breach but pleaded no facts justifying application of statute granting relief from forfeitures, defendant could claim no relief under that statute on appeal. Civil Code, § 3275.

4. Appeal and error 🔑1010(1)

Findings made by trier of fact must be affirmed if there is any substantial evidence in support thereof.

5. Logs and logging 🔑3(15)

In action to quiet title to realty and timber thereon alleging breach of contract for sale of timber, evidence was insufficient to sustain finding that buyer of timber was in default in minimum monthly payments.

◆

Burke & Rawles, Newell Rawles, Ukiah, for appellant.

Chas. Kasch, Ukiah, and Leo M. Cook Ukiah, for respondent.

PEEK, Justice.

This is an appeal by defendant Ukiah Lumber Mills from a judgment quieting plaintiff's title to certain real property and the timber thereon. In addition the judgment decreed that a contract between plaintiff and defendants for the purchase and sale of the timber had been lawfully terminated by respondent by reason of defaults in payments thereunder by defendants and that said contract was null and void.

The complaint alleged two causes of action; count one contained allegations to quiet plaintiff's title to the land therein described and count two alleged the execution of a contract for the sale to defendants and the defendants' failure to make payments in accordance with the terms thereof. Defendants' answer claimed an interest in the land by virtue of the contract and denied that it had been breached. The case was tried before the court without a jury which rendered the aforesaid judgment appealed from by said defendant.

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* Dismissed March 15, 1950.

Said contract, the terms of which are not in dispute, was executed on April 11, 1946 by Marin Mann Thomas and her husband Fred Thomas, who was then living, and Charles P. Lyons, wherein the Thomas' agreed to sell and Lyons agreed to buy the timber standing on the Thomas property. Subsequently the contract was assigned by Lyons to the defendant Ukiah Lumber Mills. The sale price of the timber was $1.75 per thousand feet payable on or before the 10th day of each month for the timber cut during the preceding month beginning June 10, 1946. The contract further provided that the minimum monthly payment should not be less than $200. Payment was excused for the calendar month in which the buyer was prevented from hauling logs by government regulations or other restrictions or by weather conditions. The buyer was required to submit to the sellers a statement on or before the tenth day of the month showing the number of feet hauled during the preceding month. Upon the execution of the contract $6,022 was paid by the buyer, of which sum $1,022 was to be credited by the sellers to the monthly payments first to become due from the buyer and the balance was payment in advance for the last $5,000 worth of timber removed. When the parties estimated the value of the remaining timber equalled the advance, the quantity of timber yet to be removed was to be determined by agreement or on appraisal by a cruise made by a timber cruiser. It was provided further that if the buyer defaulted in the payment of any money due under the contract or otherwise committed any act of insolvency as therein enumerated, the sellers could, at their option, immediately terminate the agreement by notice to the buyer and if they so desired declare the balance of the purchase price immediately due and payable. With respect to default by the buyer in any of the terms, conditions or covenants, other than payments of money, the contract provided for a thirty day written notice to the buyer requiring performance within said time and if performance was not effected within said period the sellers could declare a default. Time was made the essence of the agreement and it was provided that a waiver of any of the terms and provisions would not operate as a waiver of such terms in the future.

The court found that the defendant did not make regular minimum monthly payments of not less than $200 as required by the contract and that it was in default in the sum of $439.25 on November 25, 1947, the date of the filing of the complaint. The court further found that at the date of default the remaining timber was worth more than $5,000 at a price of $1.75 per 1,000 feet; that the buyer did not furnish at the sellers a statement showing the number of logs hauled during the preceding month and that the filing of the complaint and its service upon the defendant served as notice that the sellers exercised the option to terminate the contract.

Appellant contends that the evidence is insufficient to sustain the findings that there was a default in the monthly payments; that the contract of sale was modified by two subsequent agreements and that a forfeiture occurred from the termination of the contract from which it should have been relieved under the provisions of section 3275 of the Civil Code.

Turning first to the question of whether the contract of sale was subsequently modified, the record discloses the following circumstances. Respondent Thomas was indebted to the Redwood Empire Production Credit Association and on January 1, 1947 executed an assignment of the moneys accruing under said contract to said Credit Association. The assignment contained a provision that on and after August 1, 1947 and until the advances made by the defendant Ukiah Lumber Mills should have been repaid the Ukiah Lumber Mills had the right to retain one-third of the moneys accruing under the contract of sale entered into by respondent Thomas with the Ukiah Lumber Mills. The amount of the advances made by said lumber mills was not specified. On February 18, 1947 said mills entered into an agreement with the Redwood Empire Production Credit Association wherein it agreed to be bound by the previous assignment. This agreement specified that the advances made by said mills to respondent Thomas totalled $1,822. The effect of the foregoing agreements, according to appellant, was that respondent Thomas acknowledged that $1,822 had been advanced by appellant on account of the contract for the purchase of timber for which appellant is entitled to be credited, and that a default in the payments required to be made under said contract cannot be considered to have occurred prior to their execution.

[1, 2] Whether or not appellant's foregoing contention is correct cannot be decided from the condition of the record herein. The alleged modification was not pleaded by appellant and thus no issue with respect thereto was raised in the trial court. The rule is well settled that a party cannot assert a new theory on appeal for the first time. Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934.

[3] Appellant's contention that it should be relieved from the alleged forfeiture under the provisions of section 3275 of the Civil Code likewise cannot be considered by this court since appellant did not plead facts justifying the application of said section. See Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367.

[4, 5] Appellant's remaining contention relates to the sufficiency of the evidence to sustain the finding that they were in default in the minimum monthly payment as of November 25, 1947 in the sum of $439.25.

From our examination of the checks received in evidence we are unable to determine for which monthly period they were given in payment. We find no testimony which purports to specifically allocate the checks to the applicable monthly period. Defendant's Exhibit N, which was referred to by the trial court in its memorandum opinion, is a sketchy record which is of no assistance to us. Our difficulty in this regard is well illustrated by the fact that respondent's brief sets forth one formula for the application of the payments different from that of the trial court while her oral argument was predicated upon a yet different formula which leads to a result not only different from the result reached by appellant but also different from that reached in respondent's reply brief.

In view of the state of the record it is impossible for this court to determine whether a default existed, or if it did, in what amount. While the amount of the default is immaterial, the fact of a default is. We are mindful of the rule that findings made by the trier of fact must be affirmed if there is any substantial evidence in support thereof but since the record before us discloses no evidentiary basis for finding that a default existed, we are forced to the conclusion that the finding of a default is not sustained by the record and the judgment must therefore be reversed.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

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95 Cal.App.2d 214

JIRAL v. DAY.

Civ. 7702.

District Court of Appeal, Third District, California.

Dec. 20, 1949.

Beulah Jiral brought action against W. H. Day, also known as Mrs. W. H. Day, for breach of contract to purchase apartment building and furnishings. The defendant filed a cross-complaint for damages on ground that defendant was denied immediate possession of the building.

The Superior Court of Sacramento County, B. F. Van Dyke, J., rendered judgment for the plaintiff, and the defendant appealed.

The District Court of Appeal, Peek, J., affirmed the judgment, holding that evidence sustained finding that furniture owned by tenants in building was not included in sale of building, and that evidence sustained finding that defendant was not to be placed in immediate possession.

1. Appeal and error ⚷1010(1)

Where conclusion of the trial court is predicated on substantial evidence, though conflicting, the power of review of the District Court of Appeal is at end.

2. Vendor and purchaser ⚷80

In action by vendor for breach of contract by purchaser to purchase apartment building and furniture and furnishings, evidence sustained finding that furniture owned by tenants was not included in sale of the building.

3. Vendor and purchaser ⚷350

In action by vendor for breach of contract by purchaser to purchase apartment building and furnishings, wherein purchaser filed a cross-complaint for damages because of failure of vendor to place purchaser in immediate possession, evidence sustained finding that purchaser was not to be placed in immediate possession.

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Seth Millington, Gridley, for appellant.

Sherman C. Wilke, Sacramento, for respondent.

PEEK, Justice.

This controversy arises out of an alleged breach by defendant Day of a written contract to purchase certain real and personal property owned by the plaintiff Jiral.

The complaint, in substance, alleged that plaintiff was the owner of a certain dwelling house (which is referred to in the record as a flat or apartment building) together with the furniture and furnishings located therein; that by the terms of a written contract between the parties plaintiff agreed to sell and defendant agreed to buy said property in accordance with the terms set forth in said contract; that plaintiff performed all of the covenants and conditions on her part and was ready, willing and able to convey to defendant in accordance with said contract but that defendant refused to perform as therein agreed which failure resulted in certain alleged damages to plaintiff. Defendant's answer admitted the execution of said contract but denied that she had breached the same or that plaintiff had fully performed. In addition defendant, by cross-complaint, affirmatively alleged that said contract was merely a preliminary agreement which was to be redrafted by plaintiff's attorney to express the true intention of the parties; that a subsequent agreement was so prepared; that upon receipt of the same it was signed by defendant and returned to plaintiff for her signature, but that plaintiff refused to execute the same or to deliver possession of the premises to defendant, thereby resulting in certain alleged damage to defendant. Plaintiff's answer to the cross-complaint denied in general the allegations thereof, and the cause proceeded to trial upon the issues so raised. Findings of fact were adopted favorable to plaintiff and judgment in her favor was entered accordingly. Defendant's motion for a new trial was denied and she thereafter filed her notice of appeal from the judgment as entered.

Although the points raised by appellant in her brief are not separately stated they appear to be (1) that the evidence is insufficient to sustain the findings of the trial court, first, as such findings relate to the agreement hereinafter set forth, and second, as they relate to the furniture and furnishings in the premises, and (2) that a purchaser in an executory contract for sale of real property is "entitled to possession of the property by implication."

The agreement upon which plaintiff's complaint was predicated is as follows:

"December 12, 1947.

"I hereby sign and agree to pay on July 15, 1948 Eight Thousand ($8,000) as first installment and down payment for property located at 516 and 518 15th St. Sacramento, Calif. A total Balance of 5500 to be paid in full on or before December 31, 1948. All furniture now in house remains as is. Payment of $50.00 monthly to be paid by said Purchaser for upkeep of property up to such time as property is paid for in full.

"A total of $13,500 for 516 & 518-15th is to be paid by Dec. 31, 1948.

"Property will be clear & a clear title of insurance.

"Taxes are paid up to April of 1948.
"Lot 40′ x 80′

"Mrs. W. H. Day
"Beulah Jiral

"Witness
" Charles F. Christy
" Joseph J. Jiral"

The evidence, most of which was contradictory, discloses that the parties to the contract, the husband of plaintiff and the daughter and son-in-law of defendant, viewed the premises on December 12, 1947, that thereafter, and on the same day, the foregoing agreement was prepared and executed at plaintiff's home. Although the contract is wholly in the handwriting of plaintiff, there is evidence that defendant together with her daughter and son-in-law participated in, or as plaintiff stated "dictated" the drafting thereof, that at said time plaintiff suggested that the contract should be prepared by an attorney but that defendant declined upon the ground that by preparing the same themselves they could thereby save an attorney's fee. The record further discloses testimony by plaintiff that it was understood by all parties that because of O.P.A. regulations she could not dispossess the tenants then in possession, that the omission of any reference in the agreement as to when the defendant was to receive possession of the premises was deliberate and that the second document which, although drafted by her attorney was not at her request but at the request of the daughter and son-in-law of defendant, and because it contained a clause relative to the possession of the premises by defendant she refused to sign.

The evidence in support of the court's finding, that the parties understood that the furniture mentioned in the contract was such furniture that was then upon the premises and owned by the plaintiff and did not include furniture owned by any tenants, shows that at the time of their inspection of the premises plaintiff designated several items of furniture in the two flats which did not belong to her and which were owned by the tenants. Plaintiff further testified it was understood that the furniture owned by the tenants was not included in the sale of the property. Her testimony in this regard was corroborated by that of her husband.

[1, 2] While it is true that the record does contain evidence such as is relied upon by appellant in support of such contention it is also true that appellant has failed to consider that substantial evidence to the contrary introduced on behalf of respondent also appears in the record. See Goldring v. Goldring, 94 Cal.App.2d 643, 211 P.2d 342. Under such circumstances this court has no power but to affirm the findings so supported. It necessarily follows that since the conclusion of the trial court was predicated upon substantial evidence our power of review in that respect is at an end. Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 210 P.2d 757.

[3] In support of appellant's final contention it is argued that although the informal agreement of December 12th did not refer to a right of possession in the defendant nevertheless plaintiff knew that the only reason for the agreement was the immediate acquisition of a home for the defendant's children; that possession was the only element which gave value to the agreement and that without it the agreement would never have been consummated. Although counsel for appellant states that there are no California cases in point it would appear that since the early cases of Tewksbury v. Laffan, 1850, 1 Cal. 129 and Gaven v. Hagen, 1860, 15 Cal. 208 the mere existence of an executory contract for the sale of real property does not give rise to an "implication of a license to enter." 15 Cal. 212. And while subsequent cases have observed that courts will not be guided alone by the bare principle that possession follows the legal title, nevertheless if from all the facts and circumstances it cannot be said that there exists an implication or inference that the vendee was to be placed in possession or that such possession was contemplated by the parties the courts will follow the rule without qualification. Francis v. West Virginia Oil Company, 174 Cal. 168, 170, 162 P. 394. An examination of the record in light of the enunciated rule discloses substantial, although conflicting,

evidence in support of the implied finding that the vendee was not to be placed in immediate possession of the premises.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

95 Cal.App.2d 56

HOLLYWOOD TERMITE CONTROL CO., Inc., et al. v. STRUCTURAL PEST CONTROL BOARD et al.

Civ. 17245.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1949.

Petition by Hollywood Termite Control Company, Inc., and J. Wilfred Gunn against Structural Pest Control Board, and others for a writ of mandate to review a decision and order of the Structural Pest Control Board disciplining the petitioners for violation of the Structural Pest Control Act.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., sustained a demurrer to the petition without leave to amend, and the petitioners appealed.

The District Court of Appeal, McComb, J., held that the petition was properly dismissed and affirmed the judgment.

1. Agriculture 🔑9

The holder of a group D license under the Structural Pest Control Act who contracted for structural pest control work in branches not covered by his license was properly disciplined for violation of the act although he subcontracted such work to the holder of a license which covered such work. Business and Professions Code, §§ 8560, 8505(b) (2), 8651.

2. Agriculture 🔑9

The express exclusion from group E of the Structural Pest Control Act of fumigating with poisonous gases did not by implication include the use of such gases in group D, since a reading of the act discloses that where the legislature intended to include fumigation it was expressly included. Business and Professions, § 8560.

Glen Behymer, Los Angeles, for appellants.

Fred N. Howser, Attorney General, and Alberta Gattone, Deputy Attorney General, for respondents.

McCOMB, Justice.

From a judgment of dismissal predicated upon the sustaining of a demurrer without leave to amend to petitioners' petition for a writ of mandate to review a decision and order of the Structural Pest Control Board, respondents herein, petitioner appeals.

Facts: Petitioners were holders of Group D licenses under section 8560 of the Structural Pest Control Act, Division 3, Chapter 14, Business and Professions Code.[1] Under the terms of the Structural Pest Control Act they were without authority to use fumigants in the control of termites and other wood-destroying insects and fungi. These petitioners solicited fumigation work as a means of exterminating termites and entered into contracts with various property owners whereby they agreed to do fumigation work for the extermination of termites. They thereafter subcontracted the work to a licensed fumigator authorized to use fumigants in the extermination of termites and who was a "Group A" licensee under section 8560 of the Structural Pest Control Act.

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[1] So far as material here section 8560 of the Business and Professions Code reads: "Limitation of licenses: Examinations: Rules and regulations: Application for examination and license in other grades. Subject of examination: Passing grade.

"(a) [Limitation of licenses.] Licenses issued to operators or field representatives shall be limited to the group or groups of pest control for which the applicant has qualified by application and examination. The practice of pest control is classified into the following groups, namely,

"Group A: which shall consist of practice relating to the control of termites and other wood-destroying insects and fungi, and rodent and insect control, and structural fumigation.

"Group B: which shall consist of practice relating to the control of termites and other wood-destroying insects and fungi, and rodent and insect control.

"Group C: which shall consist of practice relating to rodent and insect control with the use of insecticides, fumigants and allied chemicals, excluding however, the control of termites, other wood-destroying insects and fungi.

After notice and a hearing before an administrative officer of respondent board petitioners were disciplined for violating the Structural Pest Control Act by suspension of their license for 30 days on the ground that petitioners had violated section 8651 of the Act.

Question: Does a holder of a "Group D" license under the Structural Pest Control act who enters into a contract for the extermination of termites by the use of a fumigant, and who subcontracts such work to the holder of a "Group A" license, violate the provisions of section 8651 of the Structural Pest Control Act?

[1] This question must be answered in the affirmative. Section 8560 of the Structural Pest Control Act classifies pest control licensees, and the nine groups contain groups A to I inclusive. Only two of these groups, "A" and "C", are authorized to use fumigants, and only one of the groups, "Group A", is authorized to use fumigants in the control of termites. Section 8505 (b)2 of the Act provides as follows: "All fumigation work regulated by this chapter shall be performed under the direct and personal supervision of a person licensed under this chapter." Section 8651 of the Act reads thus: "The performing, soliciting or inspecting of structural pest control work in other branches of pest control than those for which the operator or field representative is licensed is a ground for disciplinary action."

It is the essence of the Act that the public be protected against persons who are unqualified to perform the required work. It would violate the letter of the Act to offer to do and to contract to do that which he was legally unqualified to do. It is the element of subcontracting that the original contractor assume the primary responsibility, thereafter delegating that responsibility to a further contractor who is secondarily responsible. The pest control operator cannot delegate to another that which he is unqualified to do. For the foregoing reason it is unlawful for a pest control operator to contract to perform any fumigation work which he is not legally authorized to do, and he cannot escape the effect of the statute by subcontracting the work to a duly licensed operator.

A fumigator is defined to mean any person licensed by the pest control board as a structural pest control operator or as a structural pest control field representative who shall have been qualified by the board in the group or groups of pest control which include fumigation as set forth in section 8560, Business and Professions Code.

In the present case petitioners were not fumigators within the foregoing definition since they were not licensed under section

"Group D: which shall consist of practice relating to the control of termites, other wood-destroying insects and fungi.

"Group E: which shall consist of practice relating to the control of rodents and insects with the use of insecticides and allied chemicals, excluding however, termites and other wood-destroying insects and fungi, and fumigation with poisonous gases.

"Group F: which will consist of practice relating to the control of moths and carpet beetles with the use of insecticides and allied chemicals, excluding however, the use of poisonous gases.

"Group G: which will consist of practice relating to ant control.

"Group H: which shall consist of practice relating to the control of rodents and cockroaches.

"Group I: which shall consist of practice relating to the control of rats and mice. * * *"

8560 in a group which included fumigation. Therefore when they solicited fumigation work as a means of exterminating termites they violated section 8651 and were subject to disciplinary action.

[2] There is no merit in petitioners' contention that because fumigating with poisonous gases is expressly excluded from "Group E" (sec. 8560, Bus. and Prof. Code.), it must by implication be included in "Group D". In "Group E" the license extends to the practice relating to the control of rodents and insects with the use of insecticides and allied chemicals, "Excluding however, termites and other wood-destroying insects and fungi, and fumigation with poisonous gases." It is obvious in reading the entire section that the Legislature did not intend the term "insecticides and allied chemicals" to be construed to be broad enough to include fumigation with poisonous gases. "Group A" is identical with "Group B" excepting that "Group A" includes fumigation. It is clear that whereever the Legislature intended to include fumigation it was expressly included.

Neither is there any merit in petitioners' contention that the work was in fact done "under the direction and personal supervision of a person licensed" to do such work. The purpose of such requirement in section 8505, subsection (b) was to prevent a licensee from contracting for fumigation work and then permitting unlicensed and irresponsible persons to be in charge of and actually do the work. Because in the case at bar this portion of section 8505, subsection (b) of the Business and Professions Code was complied with does not relieve petitioners from responsibility for violating another section of the Code, which they did, to wit, the soliciting of structural pest control work in other branches of pest control than those for which they were licensed. (Section 8651, Business and Professions Code).

In view of our conclusions it is unnecessary to consider other arguments presented by counsel.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

34 Cal.2d 552

TAYLOR v. GEORGE.

Sac. 5969.

Supreme Court of California, in Bank.

Dec. 16, 1949.

Action by Mary Z. Taylor, formerly Mary Zella Williams, against Marjorie George, as executrix of the last will of Charles Williams, deceased, to recover on a claim against decedent's estate based on provision in final divorce decree for support of minor child of plaintiff and decedent.

The Superior Court of San Joaquin County, George F. Buck, J., entered judgment for defendant and plaintiff appealed.

The Supreme Court, Shenk, J., held that decedent by will had designated insurance proceeds as fund out of which his obligations under divorce decree were to be met and that such obligations had been satisfied and affirmed the judgment.

For prior opinion see 204 P.2d 959.

1. Trial 🔑388(2)

Where case is submitted upon a stipulation of facts, trial court ordinarily need not make findings of fact, but where stipulation sets forth evidentiary material only, it is proper for trial court to make findings of the ultimate facts.

2. Appeal and error 🔑1071(6)

Failure to make a specific finding on issue of whether testator intended to satisfy his obligation under property settlement agreement and divorce decree to pay $50 per month for support of minor son by naming son beneficiary of insurance on testator's life was not reversible error, since judgment for executrix in action against estate for support payments accruing after testator's death constituted an implied determination of such issue, particularly in view of trial court's memorandum opinion.

3. Appeal and error 🔑533(1)

Written opinion of trial court was properly included in record on appeal. Rules on Appeal, rule 5a.

4. Divorce 🔑310
Executors and administrators 🔑202(1)
Husband and wife 🔑279(4)

Obligation of father to support minor child which is fixed by divorce decree or property settlement agreement does not cease upon father's death but survives as a charge against his estate.

5. Executors and administrators 🔑224

A final decree of divorce providing for support of minor child was the "judgment" of a court in equity within Probate Code provision requiring a money judgment recovered against decedent during his lifetime to be filed or presented in the same manner as other claims. Probate Code, § 732.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Judgment".

6. Executors and administrators 🔑242

Probate Code provision, requiring a money judgment recovered against decedent during lifetime to be filed or presented in the same manner as other claims, contemplates maintenance of action against estate to establish validity of a claim based on such judgment, if claim is rejected by executor. Probate Code, § 732.

7. Divorce 🔑156

An interlocutory judgment of divorce, in so far as it determines the rights of the parties, is a "contract" between them.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contract".

8. Executors and administrators 🔑202(1)

Provision in final divorce decree requiring father to pay $50 per month for support of minor child was a "contract" which did not cease upon death of father and action thereon could be maintained under Probate Code against executrix of deceased father's estate. Probate Code, § 573.

9. Wills 🔑714

By recital in will that no provision was made for son because he was named beneficiary of insurance on testator's life in an amount sufficient for his needs so far as any contribution from testator was concerned, testator designated insurance proceeds as fund out of which his obligations under divorce decree to support son were to be met and where proceeds of insurance of which son was beneficiary exceeded future support payments provided for by divorce decree, testator's obligations thereunder were satisfied. Probate Code, § 106.

10. Wills ⟹714

Recital in will that no provision was made for son because he was named beneficiary of insurance on testator's life in an amount sufficient for his "needs" so far as any contribution from testator was concerned used quoted word as synonomous with "support" and expressed testator's intention to satisfy his obligation under divorce decree to support son by making him beneficiary of such insurance. Probate Code, § 106.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Needs" and "Support".

◆

Mazzera, Snyder & DeMartini and J. Calvert Snyder, Stockton, for appellant.

O. C. Parkinson, Stockton, for respondent.

SHENK, Justice.

This action was brought on a rejected claim against the estate of Charles E. Williams, deceased. The plaintiff is the former wife of the decedent. The claim was based upon an order in a final decree of divorce directing the husband to pay to the wife $50 per month for the support and maintenance of their minor son during his minority.

The case was heard upon a written stipulation of facts to which were attached a property settlement agreement between the spouses, a deed made by the plaintiff pursuant to the property settlement, the last will and testament of Charles E. Williams, the claim of the plaintiff against the estate and the notice of rejection of claim.

The stipulation and attached exhibits disclose that Charles E. Williams and the plaintiff, then husband and wife, entered into a written property settlement agreement on October 1, 1942, by which they agreed to divide the community property valued at $4,400 equally, and the husband agreed to pay to the wife $50 per month for the support of their minor child, Charles E. Williams, Jr. then aged 7, until the child should die, become self-supporting, attain the age of 21, cease to be in the care of the wife, or until a court should otherwise order. The agreement contained a further provision that insurance policies upon the life of the husband were to be his without restriction, with right to change beneficiary, cash or otherwise dispose of the same.

Thereafter an interlocutory decree of divorce was entered by the superior court in San Joaquin County adjudging that the plaintiff was entitled to a divorce from the decedent; that the custody of the minor child be awarded to the wife and that the decedent pay to the wife the sum of $50 per month for the support of the child until the child should become self-supporting or attain the age of 21. A final decree of divorce containing the same provisions for custody and support of the child was entered on November 8, 1943.

The decedent made all support payments until the date of his death on August 6, 1946. A will executed by the decedent in May of 1944 was admitted to probate and the order admitting it has become final. The will gave all of the decedent's property to his sister, the defendant Marjorie George, who was named as executrix. The second paragraph of the will provided: "2. I have in mind my said son, Charles E. Williams, Jr., and expressly make no provision for him in this will for the reason that I have in force policies of life insurance upon my own life, in which he is named Beneficiary, in the amount of $7,000.00, and feel that such provision is, and will be sufficient for his needs so far as any contribution from me is concerned." At the time of his death the insurance on the life of the decedent as to which the son was named beneficiary amounted to $6,176. These policies were transferred to the plaintiff as guardian of the estate of the minor child by the defendant executrix and the plaintiff entered into contracts with the insurers as to the manner of payment to the plaintiff of the proceeds for the benefit of the child.

In due time the plaintiff presented a claim, based upon the divorce decree, to the defendant executrix for $5,500, representing the aggregate of monthly payments of $50 per month for the support of the child from September 1, 1946, to November 1, 1955, the date on which the child will reach his majority. The claim was rejected, whereupon the plaintiff instituted the present action on the claim.

The trial court rendered judgment for the defendant. In view of the stipulation of facts no findings were made. The court's memorandum opinion states, however, that it was the conclusion of the court that the decedent intended the insurance policies to be the means of payment of the sums payable for the support of his minor son as decreed in the divorce action, and that the delivery of those insurance policies to the plaintiff constituted full payment of any liability under the divorce decree.

The plaintiff contends 1) that the trial court should have made findings of the ultimate facts since the stipulation merely set forth evidentiary material, 2) that the provision in the divorce decree requiring the decedent to support his minor child survived the father's death, 3) that the payment of insurance benefits to the minor child did not constitute a satisfaction of the judgment in the divorce action, and 4) that the court could, as prayed in the complaint, impound sufficient funds of the estate to pay for the support of the child during his minority.

The defendant contends 1) that the failure of the trial court to make findings, if error, was not prejudicial; 2) that under section 573, Probate Code, support money cannot be collected in an action against the father's estate where the claim is based upon a divorce decree; and 3) that the trial court correctly held that the decedent intended to satisfy the obligation to the child by means of the insurance proceeds.

[1–3] Ordinarily, the necessity for findings of fact is dispensed with where the case is submitted upon a stipulation of facts. Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 335, 253 P. 726; Wixon v. Davis, 198 Cal. 641, 644, 246 P. 1041; Muller v. Rowell, 110 Cal. 318, 42 P. 805. It has been held, however, that where the stipulation sets forth evidentiary material only, it is proper for the trial court to make findings of the ultimate facts. Crisman v. Lanterman, 149 Cal. 647, 654, 87 P. 89, 117 Am.St. Rep. 167; Zimmerman v. Continental Life Ins. Co., 99 Cal.App. 723, 727, 279 P. 464; Lager v. Erickson, 13 Cal.App.2d 365, 56 P.2d 1287. Although all of the evidence in this case was embraced within the stipulation and exhibits attached thereto, it is at least arguable that the ultimate fact of whether the decedent intended to satisfy his obligation of support by means of the insurance benefits was a fact to be found by the trial court. But the failure to make a specific finding on that subject does not require a reversal. The judgment rendered on the stipulated facts in the defendant's favor may be deemed in itself an implied determination of the ultimate fact. Stanwood v. Carson, 169 Cal. 640, 646, 147 P. 562. The written opinion of the trial court, properly included in the record on appeal (Rule 5a, Rules on Appeal), further supports our conclusion on that question.

[4] In California the rule is that the obligation of a father to support his minor child which is fixed by divorce decree or property settlement agreement, does not cease upon the father's death, but survives as a charge against his estate. Newman v. Burwell, 216 Cal. 608, 15 P.2d 511; Estate of Smith, 200 Cal. 654, 254 P. 567; Estate of Caldwell, 129 Cal.App. 613, 19 P.2d 9.

The defendant argues, however, that only those actions authorized by section 573 of the Probate Code can be brought against the estate, and that an action founded upon a claim for support money directed to be paid in a decree of divorce, is not sanctioned. In other words, the defendant concedes that if the claim presented to her for support had been based upon the provision for support of the minor child in the property settlement agreement, an action founded upon the contract could be brought upon the rejected claim under section 573 which provides: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to enforce a lien thereon, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the cause of action whether arising before or after death is one which would not abate upon the death of their respective testators or intestates. * * *" Since the plaintiff rested her claim upon the decree of divorce rather than the prior property settlement, the defendant asserts that no action upon the claim is authorized by the code section.

The contention that an action may be brought against the executor based upon a provision for support of a minor child in a private contract but that no action may be brought when the same provision is embodied in a valid decree of divorce, does not appeal to reason and is not supported by statute or decision.

[5-8] The final decree of divorce was the judgment of a court in equity. See Carroll v. Carroll, 16 Cal.2d 761, 769, 108 P.2d 420, and cases cited therein; Vol. 10 Words and Phrases, Perm.Ed. p. 406. Section 732 of the Probate Code provides that a money judgment recovered against the decedent during his lifetime must be filed or presented to the executor or administrator in the same manner as other claims. It is apparent that in enacting section 732 the legislature contemplated that if the executor rejects a creditor's claim based upon a judgment rendered against the decedent in his life time, an action may be brought to establish the validity of the claim, and such has been assumed to be the rule in numerous cases. United States Gypsum Co. v. Shaffer, 7 Cal.2d 454, 60 P.2d 998; Saunders v. Simms, 183 Cal. 167, 190 P. 806; Newman v. Burwell, supra, 216 Cal. 608, 15 P.2d 511; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 45 P.2d 415. It is also apparent, contrary to the defendant's contention, that section 573 permits such an action. It has been held in this state that a judgment is a contract. Jones v. Union Oil Co. of California, 218 Cal. 775, 778, 25 P.2d 5; Miller v. Murphy, 186 Cal. 344, 347, 199 P. 525; Weaver v. San Francisco, 146 Cal. 728, 732, 81 P. 119. "An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them." London Guarantee & Accident Co. v. Industrial Accident Comm., 181 Cal. 460, 465, 184 P. 865, 867. The provision of the final decree of divorce in question was a contract which did not cease upon the death of the decedent and an action was maintainable thereon against the defendant executrix under section 573.

[9] While the defendant's contention that the plaintiff could not properly bring this action cannot be sustained, there is merit in her claim that the judgment is supported on the ground that the decedent's will when reasonably construed shows that the testator intended to and did fulfill his obligation of support by means of the life insurance policies. No reason appears why the testator could not, by his will, designate the fund out of which his obligations were to be met.

[10] The will declares that the testator feels that the provision he has made for his son by means of life insurance "is and will be sufficient for his needs so far as any contribution from me is concerned." The word "needs" as used in the will may well be deemed synonomous with "support." The further phrase "so far as any contribution from me is concerned" when read in its ordinary sense (Prob.Code, sec. 106), appears to be a reference to the testator's duty of support, and was undoubtedly intended by him as a complete satisfaction of that duty. It is to be noted that the insurance referred to in the will and paid over to the plaintiff on behalf of the child was $6,176. This was more than sufficient to meet the future payments totalling $5,500, provided for by the decree of divorce. It does not appear in the stipulated facts who the beneficiary of the policies was at the time of the marriage settlement agreement. However, by that agreement the decedent reserved the right to change the beneficiary and cash or otherwise dispose of the policies. The fact that at the testator's death the child was found to be the beneficiary, when considered in the light of the terms of the will, affords a reasonable basis for the conclusion that the provi-

sion for insurance was intended as a fulfillment of the obligation of support.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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34 Cal.2d 525

MOORE v. BELT et al.

L. A. 20994.

Supreme Court of California, in Bank.

Dec. 16, 1949.

As Modified on Denial of Rehearing

Jan. 12, 1950.

Action by H. T. Moore against Elmer Belt and others to recover damages for alleged malpractice.

The Superior Court for Los Angeles County, William S. Baird, J., entered judgment on a verdict for named defendant and plaintiff appealed.

The Supreme Court, Shenk, J., held that the issue as to causal connection between genito-urinary examination by defendant and subsequently discovered infection of urinary passages was submitted to jury under proper instructions and that restriction of plaintiff's examination of his expert witness was not prejudicial and affirmed the judgment.

Carter and Traynor, JJ., and Gibson, C. J., dissented.

Prior opinion, 203 P.2d 22.

1. Physicians and surgeons 🔑18(8)

Generally, what constitutes proper and usual practice in diagnosis and treatment is a question for experts and can be established only by their testimony.

2. Physicians and surgeons 🔑18(10)

In malpractice action, where evidence as to causal connection between examination by physician and subsequently discovered infection was conflicting, the issue was properly submitted to jury under instructions that physician's negligence could not be presumed but must be based on testimony of experts and that if jury found that plaintiff sustained injury as the result of introduction by physician of a new infection, an inference arose that the proximate cause of injury was some negligence or malpractice of physician which it was incumbent upon him to rebut.

3. Evidence 🔑536

A medical expert is not qualified as a witness unless he is shown not only to have the required professional knowledge, learning and skill to express his opinion, but is also familiar with the standards required of physicians under similar circumstances.

4. Evidence 🔑545

A party is entitled to examine an expert witness as to his qualifications and experience so that the full weight to be accorded his testimony will become apparent.

5. Evidence 🔑545

In malpractice action, the extent of examination of medical expert as to his qualifications in relation to the subject matter of his opinion as to cause of infection of urinary passages was within the sound discretion of trial court.

6. Evidence 🔑546

In malpractice action, where medical expert, having given a chronological account of his education and experience and demonstrated his anatomical knowledge as it related to the genito-urinary system, admitted that he did not know the methods of practice in conducting genito-urinary examinations but was permitted to express his opinion in response to hypothetical question as to cause of infection of urinary passages, excluding further repetitious hypothetical questions and questions based on his knowledge of existing standards in the practice of urology was not abuse of discretion.

7. Appeal and error 🔑1048(6)

Where expert witness called by plaintiff in malpractice action was not qualified, according to his own admission, to express an opinion concerning existing standards in the practice of urology, refusal to permit him to explain on re-direct examination his affirmative answer to question on cross-examination as to whether his opinion in response to hypothetical question as to cause of infection of urinary passages, allegedly resulting from genito-urinary examination by defendant, assumed competent manipulation of instruments in the examination was not prejudicial error.

◆

E. Briggs Howarth and Walter R. Trinkaus, Los Angeles, for appellant.

Fulcher & Wynn, Gibson, Dunn & Crutcher and Philip C. Sterry, Los Angeles, for respondent.

Hartley F. Peart, Gus L. Baraty, Howard Hassard, George A. Smith, Alan L. Bonnington, San Francisco, Reed & Kirtland and Louis J. Regan, Los Angeles, amici curiæ on behalf of respondent.

SHENK, Justice.

Appeal by the plaintiff from a judgment on a verdict for the defendant in an action to recover damages for alleged malpractice. The appeal is on a settled statement. Due to an admitted conflict in the testimony it is not contended that the evidence is insufficient to support the verdict. The plaintiff's principal assignments are that the court committed prejudicial error in the instructions on the issue of negligence and in rulings on the admission of evidence.

The defendant is a physician practicing in the county of Los Angeles and has specialized in urology since 1923. The plaintiff, an attorney, is 46 years old and resides in Los Angeles. He formerly lived in Texas. On June 7, 1944, he appeared at the defendant's office pursuant to an appointment. His medical history given at that time showed the following:

In childhood he experienced the usual children's diseases. In his youth he had trouble with his left testicle which was small and would draw up into the abdomen upon pressure. This condition continued throughout the years causing him pain and discomfort. Beginning about 1920 a sinus infection developed which gave him much distress. Drainages in 1921 quieted the area somewhat until 1930. The difficulty recurred and in 1932 he had a bone cutting operation which did not entirely remove the trouble. At times he had a slight rheumatic pain in the right wrist. Periodic pain centering in the lower abdominal region commenced about 1936. It was preceded by a slight nonvenereal urethral discharge which disappeared after treatment. X-ray and fluoroscopic examinations were made in El Paso and again in 1939 in Los Angeles in an attempt to locate the origin of the abdominal pain, and in 1942 the appendix was removed. But the difficulty remained and called for further study. For this purpose the plaintiff was sent by his personal physician to the defendant.

At the defendant's office the plaintiff was subjected to examination and tests of the prostatic secretion, the urine, and for syphilis. He was then prepared for cystoscopic examination which was conducted by the defendant with the use of instruments and fluids inserted through the ureters. X-ray pictures were taken. Before he departed the plaintiff was informed by the defendant that the tests showed negative results except for five per cent pus cells in the prostatic secretion which was stated to be normal, and that his trouble could not be traced to any infection or difficulty in the genito-urinary system.

The plaintiff worked at his office the following day and evening until eight o'clock when he had a chill and went home. Chills and fever continued alternately throughout the night and the next day. The defendant was out of the city and the plaintiff called Dr. Hyde who took samples of urine to his laboratory for tests and later reported the results which were not given in evidence. Sulfa drugs were sent from the defendant's office for administration. The following day Dr. Guth of the defendant's staff called, made examinations and advised continuing the drugs. Chills and profuse sweating continued and the plaintiff was taken to a hospital where he was attended by Dr. Ebert from the defendant's office. Dr.

Ebert informed the plaintiff that he was being treated for an acute infection of the urinary passages but it was not understood how the infection arose. The chills and fever abated on June 14th and on June 16th the plaintiff returned to his home where he was confined for ten days. On June 27th he reported at the defendant's office and after prostatic and urinary tests was told he had a twenty-five per cent infection. Subsequent tests showed the infection decreasing gradually to ten per cent. He was informed that the defendant did not know the cause of the infection. The plaintiff then began treatment with his personal physician. Because of an apparent allergy to sulfa drugs, penicillin was substituted in the treatment and apparently proved more effective.

On the trial the plaintiff produced one expert witness, an autopsy surgeon in Los Angeles, who testified that in his opinion the twenty-four hours between the cystoscopic examination and the fever symptoms constituted an incubation period for bacteria introduced into the delicate channels by unsterile instruments or, assuming proper sterilization of the instruments, from the opening of the channels whose edges were not thoroughly cleansed; that the results showed a well-seated infection in the urinary tract which was not present prior to instrumentation.

Witnesses produced by the defendant testified concerning standards of treatment and sterilization methods and stated that in their opinion the infection was not caused by any unsterile preparatory procedure nor introduced from outside sources in the conduct of the cystoscopic examination but, based on the prior medical history, was attributable to low-grade chronic infection in the genito-urinary tracts, probably prostatic in origin, or to the use of sulfa drugs, or to influenza from respiratory inflammation or sinus infection.

At the defendant's request the court charged the jury in substance that the defendant's negligence could not be presumed but must be based on the testimony of experts; also that the jury could not set up a standard but must be governed solely by the testimony of expert witnesses.

The plaintiff requested an instruction (based on B.A.J.I. 214-B Pocket Parts) embodying the substance of the foregoing instructions and adding that expert testimony was not required to establish a fact based on common knowledge that danger is involved where certain precautionary measures including sterilization are not followed, whereupon whether the condition was caused by negligence may be decided in the light of such common knowledge. The requested instruction was refused but at the plaintiff's request the jury was charged that if it be found that the plaintiff sustained injury as the result of the introduction by the defendant of a new infection, an inference arose that the proximate cause of the injury was some negligence or malpractice on the part of the defendant which it was incumbent upon him to rebut by clear, positive and uncontradicted evidence that the injury occurred without any failure of duty on his part.

The plaintiff contends that the instructions given were conflicting and confused the jury; that the correct theory of the case is that as a matter of common knowledge the result does not usually happen when sterilization has been proper; that expert testimony was not required to prove negligence; therefore that the instructions in conflict with his theory were erroneous, misleading and prejudicial.

On the other hand the defendant, supported by state and county medical associations as amici curiae, questions the propriety of any application of a doctrine based on common knowledge in the absence of the fact first established without conflict that the infection was introduced by the act of the defendant. It is therefore contended that the record presents issues of fact solely within the knowledge of experts and that the plaintiff's given instruction which incorporated a statement of the res ipsa loquitur doctrine was more favorable to him than the record warranted.

[1] The given instructions embodied a statement of the general rule that the proper and usual practice in diagnosis

and treatment is a question for experts and can be established only by their testimony, Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642, and the exception declared in Barham v. Widing, 210 Cal. 206, 291 P. 173, and other cases relied on by the plaintiff.

In Barham v. Widing the defendant extracted a tooth from the plaintiff's jaw. An infection developed which from the evidence could be traced to the use of an unsterile hypodermic needle or solution inserted to anaesthetize the jaw. The jury was instructed that if the defendant used an unsterile needle or solution which proximately caused the infection the plaintiff should recover. It was claimed that the omission of the words "carelessly and negligently" was prejudicial error. This court affirmed the judgment entered on the verdict for the plaintiff and determined that the mere fact of infection following and traceable to improper sterilization was evidence of carelessness and negligence; that the court would take judicial notice that in common knowledge such a result does not follow proper sterilization and that observance of the ordinary standards would preclude the use of an unsterile needle or solution; therefore the omitted words were not necessary to a proper charge. Declarations to similar effect and variously stated have been applied in many situations, Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12; Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604; Bellandi v. Park Sanitarium Ass'n, 214 Cal. 472, 480, 6 P.2d 508; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Dean v. Dyer, 64 Cal.App.2d 646, 653, 149 P.2d 288; Mastro v. Kennedy, 57 Cal.App.2d 499, 504, 134 P.2d 865; Walter v. England, 133 Cal. App. 676, 680, 24 P.2d 930; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 467, 12 P.2d 744, 13 P.2d 905; In other cases the doctrine has been recognized. Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695 and cases cited; Church v. Bloch, 80 Cal.App.2d 542, 548-549, 182 P.2d 241; Rising v. Veatch, 117 Cal.App. 404, 408, 3 P.2d 1023; Donahoo v. Lovas, 105 Cal.App. 705, 709, 288 P. 698.

[2] In the cases cited where the doctrine was held applicable evidence that the defendant did not cause the injury was remote and it followed as a matter of common knowledge from the nature of the injury that the result would not happen without carelessness or negligence. In the present case the inference that the injury was not caused by the defendant, but from some source theretofore existing in the plaintiff's system, was not remote but could be drawn from substantial evidence in the record. On the evidence of the plaintiff's medical history the jury was not required to but could reasonably conclude that the prior infection, and not any negligent act on the part of the defendant, was the proximate cause of the trouble. The inference based on common knowledge is at the root of the res ipsa loquitur doctrine. Before it could be drawn under the facts of this case the jury would have to reject the hypothesis that the plaintiff's prior condition was the proximate cause. Prosser, Torts, p. 295; Prosser, Article Res Ipsa Loquitur in California, 37 Cal.Law Rev. 183, 201; Ybarra v. Spangard, supra, 25 Cal. 2d at page 489, 154 P.2d at pages 688, 689, 162 A.L.R. 1258. Omitted from the plaintiff's refused instruction but included in his given instruction covering the res ipso loquitur doctrine, is the necessary element of causal connection between the act and the injury. An instruction based on the plaintiff's theory that the exception only should be applied would resolve in his favor the issue of causation and thereby take that question from the jury's consideration. The evidence on that issue was conflicting and the court correctly submitted the case to the jury with the inclusion of the element of causation, thereby calling for statements of both the general rule and the exception. See Barham v. Widing, supra, 210 Cal. at page 216, 291 P. at page 177; Nelson v. Painless Parker, 104 Cal. App. 770, 775, 286 P. 1078. Since there was no real contradiction as to the applicable theories, it may not be said that the jury was misled to the prejudice of the plaintiff on a record of conflicting evidence containing substantial support for the jury's verdict, and this court is therefore not at liberty to disturb the result of the jury's deliberations.

It is urged that the trial court unduly limited the plaintiff's examination of his expert witness. It appeared from the testimony of this witness that he had practiced as an autopsy surgeon for twenty-nine years, that he did not practice urology, did not conduct genito-urinary examinations in the diagnostic or treatment fields, and did not know the methods of practice therein, but that he had learning and knowledge of the anatomy and of infections in relation to the genito-urinary system. When this testimony was given and after consultation and offers of proof in chambers, the court excluded hypothetical questions addressed to this witness based on his knowledge of the existing standards in the practice of urology, but permitted one hypothetical question to elicit the witness' opinion as to the cause of the infection.

[3-7] A medical expert is not qualified as a witness unless he is shown not only to have the required professional knowledge, learning and skill to express his opinion, but is also familiar with the standards required of physicians under similar circumstances. Sinz v. Owens, supra, 33 Cal.2d at pages 753 et seq., 205 P.2d at page 5. A party is entitled to examine an expert witness as to his qualifications and experience so that the full weight to be accorded his testimony will become apparent. Salmon v. Rathjens, 152 Cal. 290, 299, 92 P. 733. But in view of the witness' admitted lack of practice in urology the extent of the examination as to his qualifications in relation to the subject matter of his opinion was within the sound discretion of the trial court. Sinz v. Owens, supra, 33 Cal.2d at page 753, 205 P.2d at page 5. The witness gave a chronological account of his education and experience and demonstrated his anatomical knowledge as it related to the genito-urinary system. It does not appear that further examination either as to his qualifications or his opinion of the cause of infection would have accorded any greater weight to his testimony. The plaintiff was not unduly restricted on direct or rebuttal examination by rulings sustaining objections to further hypothetical questions which were repetitions of the question answered by the witness and to questions on subjects not within the limits of the witness' qualifications as determined by the court. Likewise the plaintiff may not complain of prejudice by reason of the court's refusal to permit the witness to explain his "yes" answer to the question whether his opinion on the hypothetical case assumed competent manipulation of instruments in the examination conducted by the defendant. Inasmuch as the court properly ruled that the witness was not qualified to give his opinion concerning the existing standards in the practice of urology, an explanation of the answer was not necessary. No prejudicial error or abuse of discretion is shown.

The judgment is affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. I cannot agree with either the result or the reasoning of the majority opinion. This case was ably and correctly disposed of by the opinion of Justice Vallée in the District Court of Appeal, and with some additions and deletions, I adopt that opinion as follows: 203 P.2d 22:

"Appellant's assignments of error are: (1) the court erred in giving instructions requested by respondent and in refusing to give instructions requested by appellant, (2) the court erred in sustaining objections to questions asked the expert called by appellant for the purpose of establishing his qualifications, in sustaining objections to hypothetical questions asked the expert, in not permitting him to explain a 'yes' answer, and in sustaining objections to questions asked him on rebuttal which assumed facts developed by the defense.

"The evidence germane to the first assignment of error will be related. Appellant went to Dr. Belt's office on June 7, 1944, for a cystoscopic examination. At the time he was a man 41 years of age. After giving the doctor a history, he was partially disrobed, the doctor palpated his abdomen and examined his testicles. He was then taken to another room for further examinations and tests preparatory to the cystoscopic examination. He was disrobed and clothed with a surgical gown. His pulse and temperature were taken. A test was made of his hemoglobin. His lungs and teeth were examined. Samples of his urine were taken, tested, and found negative. His blood pressure was taken. A syphilis test was made. It was negative. A prostatic massage was performed and a sample taken of the prostatic secretion.

"After a wait, appellant was taken to a cystoscopic examination room and assisted onto a table. The table was so constructed that he could be turned from a prone position to an erect standing position without being removed from the table. While on the table appellant could not see and did not know what was being done except what he could feel. A layman, called a technician, 26 years of age, in the absence of Dr. Belt, prepared appellant for instrumentation. The layman picked up a tray from a nurse in the next room. The tray contained an installator, swab, water tube, two syringes, a peroneal towel and a sheet. He washed appellant's male organ, injected an anesthetic therein and inserted a ¼-inch stopper to hold the anesthetic in place. Dr. Belt took a cystoscope from a tray in another room and went into the examination room. A cystoscope is an instrument about twice the length of a fountain pen, with a diameter smaller than a fountain pen, made of copper and nickel plated, with the end turned up and a hollow shaft. It was lubricated with a non-oily lubricant. The layman removed the stopper. Dr. Belt introduced the cystoscope into the opening, inserted it through the organ into the bladder and observed the interior of the bladder. The ureter openings into the bladder and the interior of the bladder appeared normal in every respect. Catheters were inserted through the cystoscope into the bladder through both renal pelves and pushed through the ureter to the kidneys. The catheters had been threaded into the cystoscope by some one not named in the evidence. A specimen of urine was collected through the catheters into test tubes and when examined it was found that there was no bacteria or pus present. A dye solution was injected into each uretral catheter and X-rays taken while appellant was in a prone position and also while he was in a standing position and while instruments remained in his body. The catheters were withdrawn and the solution remaining in the ureter was allowed to trail to the bladder as far as the prostate level and X-ray pictures taken of the area. All X-ray pictures were negative.

"*Dr. Belt testified that: the examination showed appellant's urinary tract from the kidneys down to the prostate was in a normal condition; it was a text-book picture of normalcy; after the examination he told appellant that his genito-urinary system was negative.* He testified that fever which develops an unusual time after a cystoscopic examination is not the normal reaction therefrom. Dr. Belt told appellant that if any reaction occurred at all it would occur within two hours. He also told him that the examination was entirely negative, that the blood count, hemoglobin, heart pulse and respiration were normal. Dr. Belt told him that his prostate, prostatic secretion and urine were normal, that his prostate was normal in size, shape and consistency, that his bladder was normal, that both his prostate and bladder were negative as to any pathological condition, that his kidneys and ureters were normal, that he was a text-book picture of perfection.

"About 24 hours later—4 o'clock the next day—appellant began feeling odd. He began having chills about 8 o'clock that night. He had chills and fever all night and all the next day, June 9. On June 10, he received some medicines from Dr. Belt's office which he understood were sulfa drugs. He started to take the sulfa drugs the afternoon of June 10. He continued to have chills and fever on June 10 and 11. On June 11, Dr. Guth, an assistant of Dr. Belt, went to appellant's home, examined him and told him to continue taking the medicine. Appellant continued to have alternate chills and fever. His temperature became progressively higher, running to 105 degrees about 10 p. m. on June 11. He was then taken to a hospital on the advice of Dr. Belt's assistant. The chills and fever continued. The sulfa drugs were discontinued on June 13 at 2:30 p. m. but the fever and chills persisted until June 14. He remained in the hospital until the afternoon of June 16.

"While in the hospital appellant was attended by Dr. Ebert, another assistant of Dr. Belt. Appellant, while in the hospital, asked Dr. Ebert what was *causing his severe chills and high fever.* Dr. Ebert replied, 'That's hard to say. *Everyone knows you have an acute infection of the urinary passages,* but I can't understand how it got there. But that is why you are being given the sulfa drugs and pyridium. These medicines are for infections of that kind." Dr. Ebert, although still in the employ of Dr. Belt, was not called as a witness.

"On June 27, when appellant was able to leave his home for the first time, he went to Dr. Belt's office. He was given a prostatic massage by Dr. Guth and samples of his urine were taken for tests. Aftter the tests were completed, he asked Dr. Guth the results. Dr. Guth told him that the tests showed that he still had a 25 per cent infection. Appellant was given prostatic massages by Dr. Guth until July 28, 1944. On each occasion Dr. Guth told him that he had an infection present in the urinary tract but that the amount was gradually decreasing so that at the time of his last visit the test showed only 10 per cent. Dr. Belt was away from Los Angeles from June 9 to June 23. Sometime thereafter and while Dr. Guth was giving appellant a prostatic massage, Dr. Belt appeared and appellant said, 'Dr. Belt, Dr. Guth just told me that I still have 10% infection present. I didn't have any infection when I came in here in June and I don't see why I should have any now.' Dr. Belt replied that 10 per cent was within normal limits. Appellant then asked Dr. Belt what had caused the infection in the urinary tract and the severe chills and high fever. Dr. Belt replied, 'To tell the truth, I don't know.' Dr. Belt did not deny having made this answer to appellant's query. Dr. Guth was in Wisconsin at the time of the trial. His deposition was not taken.

"The expert called by appellant testified that the 24 hours between the time of the examination and the time appellant began to have chills and fever probably was an incubation period for bacteria introduced into the urinary tract in the preparation for, or in the making of the examination, that the introduction was evidently due to some defective condition of the instruments or carrying in from the opening of the meatus (the canal in the male organ), whose edges were not thoroughly cleansed, and that the treatment given in the hospital was for an infection of the urinary tract.

"As we read the record, there is no evidence that either the stopper or the cystoscope or the catheters used in the examination were sterilized before insertion into appellant's body. Neither the lay technician nor Dr. Belt sterilized any one of them or saw any one of them sterilized. No one testified that he sterilized any one of them. On the other hand, there is no direct evidence that they were not sterilized.

"Appellant's contention is stated in his brief. He says, '(a) His genito-urinary system was in a healthy and normal condition on June 7, 1944, when he reported to respondent for a urological examination, every part of that system being free of infection of every kind and description. This was established by the records and testimony of respondent which showed that *immediately prior* to the cystoscopic examination and on the same date appellant was given various tests, including tests of his urine, prostatic secretion, blood, etc., all of which were negative and showed no infection present and, further, that the urological examination disclosed appellant's genito-urinary system to be in a healthy and normal condition. (b) About 24 hours after the cystoscopic examination had been completed by respondent, symptoms appeared showing that an infection had developed which the evidence established was within the confines of appellant's genito-urinary system. Appellant testified to the appearance of such symptoms approximately 24 hours after the examination. It was shown that 24 hours was the normal incubation period for a new infection of this type. And the fact that such infection which did not exist immediately before the examination, did exist approximately 24 hours after the examination, was established by the uncontradicted admissions of respondent and his assistants, by the nature of the treatment given, and also by expert testimony offered through Dr. Webb. (c) This infection had been caused by infectious matter which had been carried into appellant's urinary tract during the urological examination. Proof of (a) and (b) give rise to this inference which is further and directly established by the expert testimony of Dr. Webb. (d) There was no issue raised regarding the professional skill or learning of the respondent. (e) The question involved was whether respondent or his employees or assistants were negligent in failing to effect and maintain proper sterilization for such examination. This negligence was established as a question of fact by proof of (a), (b), and (c), under the principles of Barham v. Widing, 210 Cal. 206, 291 P. 174, and also by the inference of such negligence arising under the doctrine of res ipsa loquitur as announced in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258.'

"The evidence which has been related puts the case squarely within the doctrine of Barham v. Widing, 210 Cal. 206, 291 P. 174. In that case the defendant, a licensed dentist, extracted the left lower molar tooth of the plaintiff. In order to operate a local anesthetic was administered by means of a hypodermic injection of novocaine. The needle was twice inserted in the gum of plaintiff at a point over the ramus or ascending prong of the left lower jawbone near the diseased tooth. After five or six days an infection of the gum and jaw was developed. A physician testified that the locality of the primary infection was the point where the hypodermic needle had been inserted in the gum, that it 'was the center of the abscess; it was deep, very deep, so that it must have been necessary that the infection was introduced * * * on a needle, or perhaps an unsterile solution, because the pus was found very, very deep.' and that from his examination of the socket from which the tooth had been removed the socket was not the seat of the infection. The plaintiff had judgment. On appeal the defendant contended that 'the judgment is not supported by the evidence since there is a total absence of medical expert testimony to the effect that the operation and treatment of the patient in the extracting of the tooth did not conform to the standard accepted method of the profession in that vicinity.'

"In affirming the judgment the court stated, 210 Cal. at page 213, 291 P. 4 at page 176; 'The appellant asserts that the evidence is not sufficient to establish negligence on his part because there is no direct testimony that the needle or solution which was used in administering the anesthetic was unsterile; that a dentist, like a physician, is required to have and use only the degree of learning and skill which is ordinarily possessed by the dentists of good professional reputation in that locality. This is the rule with respect to physicians. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Undoubtedly the same rule applies to dentists. The jury was clearly instructed to this effect. It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert. * * * [210 Cal. at page 214, 291 P. 176]. The judgment in this case must be supported, if at all, upon the theory of appellant's negligence in failing to sterilize his hypodermic needle and the mouth and gum of the patient before performing the operation of extracting the tooth. It is true that both the dentist and his nurse testified that the usual process of sterilization was followed. It is equally true that there is no direct evidence that he failed to sterilize either the needle or the surface of the flesh where it was inserted. Barham does state that he did not remember that the dentist sterilized his mouth or gum.

"'Under the circumstances of this case there is a remote possibility that the infection developed from some cause other than the defendant's failure to sterilize the needle or the gum into which it was inserted, but the evidence is sufficient upon which to warrant the jury in finding that it was caused by his negligence in failing to follow these reasonabe precautions in spite of his testimony to the contrary. The jurors were entitled to accept the solution to which these circumstances led them, in preference, even, to the positive statements of the defendant and his nurse to the contrary. After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshalled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof. As the court says in the case of Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312:

" ' "If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

" 'It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. * * *

" 'In this case no question is raised regarding the professional skill of the dentist. It is conceded that he was reasonably learned and skilful in his profession. But it is asserted that he was negligent in failing to sterilize the hypodermic needle and the gum into which he inserted the instrument. There is no conflict regarding the fact that infection of the jaw caused the injuries to Barham. It is conclusive that this infection developed within a few days after the operation on the ramus of the jaw at just the point where the needle was inserted, and not in the socket from which the tooth had been removed. * * *

" '[210 Cal. at page 216, 291 P. at page 177]. It was not necessary for any dentist or physician to state that the conduct of the defendant was negligent or in conflict with the usual established practice of the profession in that vicinity to administer a local anesthetic for the purpose of extracting a tooth without sterilizing the needle, or the flesh into which it is inserted. The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances. This case was tried upon the theory that everyone concerned recognized this duty. We are, therefore, of the opinion that the evidence will support the judgment in this regard.' See, also, McBride v. Saylin, 6 Cal.2d 134, 56 P.2d 941; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905; Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136; Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027; Mastro v. Kennedy, 57 Cal. App.2d 499, 504, 134 P.2d 865; Dean v. Dyer, 64 Cal.App.2d 646, 149 P.2d 288; Clemens v. Smith, 170 Ore. 400, 134 P.2d 424; Drakes v. Tulloch, 220 Mass. 256, 107 N.E. 916; Hafemann v. Seymer, 195 Wis. 625, 219 N.W. 375; Swanson v. Hood, 99 Wash. 506, 170 P. 135, 137.

"In the Barham case a physician testified as an expert not that the conduct of the dentist was negligent or in conflict with the degree of care and skill ordinarily exercised by dentists in that vicinity, but simply to establish that the infection in the plaintiff's jaw was caused by an unsterile hypodermic needle or by an unsterile solution. In the case at bar appellant's expert testified merely for the purpose of establishing that the infection in appellant's urinary tract was caused by an unsterile instrument or that the parts of appellant's body into and through which the instruments were inserted had not been completely sterilized. The purpose of the expert testimony was precisely the same in each case.

"There is no difference between the facts of the Barham case and the facts of the case at bar. In the Barham case a needle was inserted into the gum and a solution injected. Five or six days later an infection appeared. The point of infection was the place where the needle was inserted. It was held that, without expert testimony, the jury could infer negligence. *Here, instruments were inserted into the male organ and the urinary tract and a solution injected. Twenty-four hours later an infection appeared. The point of infection was the urinary tract.* The jury, without expert testimony, could infer negligence. The evidence in the present case makes for a stronger inference of negligence than that in the Barham case. In that case there was no evidence that the gum was not infected at the time the needle was inserted and the solution injected. *Here the evidence—with the exception of the opinions of two defense experts which were contrary to the testimony of Dr. Belt that appellant's genito-urinary system was negative—is without conflict that the urinary tract was in a healthy and normal condition and free from infection at the time the instruments were inserted and the solution injected.* In the Barham case the infection did not appear until five or six days after the operation. Here the infection appeared about 24 hours after the examination.

"With the evidence stated before the jury, the court at the request of respondent gave the following instructions: (1) 'Negligence upon the part of a physician *is never to be presumed,* and in the absence of expert testimony to the contrary, it is to be presumed that a physician possesses and has exercised the requisite degree of skill and care in examining a patient.' (2) 'In determining the question of whether the defendant was guilty of negligence as alleged in the complaint *you cannot and must not* set up a standard of your own but must be governed in that regard *solely* by the testimony of expert witnesses who have appeared and testified in this case.' Under these instructions the jury was not permitted to determine for themselves that failure to properly sterilize the instruments inserted into the appellant's body or failure to properly sterilize the parts of the body through which the instruments were inserted, or both, was negligence. Failure on the part of a physician in either of these respects is negligence as a matter of common knowledge. There is no law, as applied to the facts of this case, which requires that the jury in determining these questions be governed solely by the testimony of expert witnesses. The practical effect of these instructions was to direct the jury to return a verdict for the respondent. * * *

"The court refused to give the following instructions requested by appellant: (1) 'In determining whether defendant's learning, skill and conduct fulfilled the duties imposed on him by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard, I remind you, was set up by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing, in the same locality at the same time. It follows, therefore, that except as hereinafter explained the only way you may properly learn that standard, is through evidence presented in this trial by physicians and surgeons called as expert witnesses.

" 'However, there is this exception to the rule just stated: when it is a matter of common knowledge that danger is involved in certain conditions or in a failure to maintain certain conditions or to take certain precautionary measures, as, for instance, failure to perform the commonly known duties of cleanliness or sterilization, expert testimony is not required to establish such a fact, but it may be judicially noticed as a part of that fund of common knowledge shared by us with our fellow citizens generally.

" 'This exception may be otherwise stated as follows: When it is common knowledge that an event or a circumstance that has happened to or developed in a patient is of this kind that ordinarily does not occur in the absence of negligence on the part of the physician attending him, the question whether or not the condition was caused by negligence may be decided from the general circumstances as shown by the evidence and in the light of common experience and reason.'

"(2) 'If you believe from the preponderance of the evidence that defendant, Elmer Belt, or any of his agents or employees, negligently used or employed either unsterilized instruments or solutions in the examination of the plaintiff or in the injecting into him of such solutions and that as the proximate result thereof infection was introduced into plaintiff thereby injuring him, plaintiff is entitled to recover from defendant, Elmer Belt, his damages herein in such sum as in your judgment, considering all of the evidence, will justly compensate him for any damage you believe him to have sustained as the proximate result thereof.' In Pierce v. Paterson, 50 Cal.App.2d 486, 489, 123 P.2d 544, the court quoted with approval from Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350, as follows: '"It is well settled that a physician and surgeon cannot be held to guarantee the results of his professional services. 'However, it is equally well settled that in undertaking a treatment of a patient the practitioner impliedly contracts and represents *not only* that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, *but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed;* and that if injury is caused by want of such skill or care on his part he is liable for the conequences which follow. (Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128; Nelson v. Painless Parker, 104 Cal.App. 770, 286 P. 1078; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369; Patterson v. Marcus, 203 Cal. 550, 265 P. 222.)'"' (Italics added.) Appellant does not contend that respondent did not have the requisite knowledge and skill. His contention is that respondent was negligent in no proper sterilization. Where the evidence conflicts, each party is entitled to have the law given to the jury which is applicable to his theory of the case and the testimony of his witnesses. Kelley v. City and County of San Francisco, 58 Cal.App.2d 872, 876, 137 P.2d 719; Buckley v. Shell Chemical Co., Ltd., 32 Cal. App.2d 209, 216, 89 P.2d 453; Dowdall v. Gilmore Oil Co., Ltd., 18 Cal.App.2d 1, 5, 62 P.2d 1051; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 455, 19 P. 820. This injunction is not met when the instructions remove that theory from consideration of the jury. Morrow v. Mendleson, 15 Cal. App.2d 15, 21, 58 P.2d 1302. It is the duty of the court to give instructions expounding the law on every reasonable theory of the case finding support in the evidence. Megee v. Fasulis, 65 Cal.App.2d 94, 101, 150 P.2d 281.

"The evidence, without the testimony of experts, was sufficient to warrant the jury in finding that the infection was caused by the negligence of respondent. It was, therefore, prejudicial error to give the two instructions requested by respondent and to refuse to give the two instructions requested by appellant."

The instructions that were given as above quoted unequivocally removed the doctrine of res ipsa loquitur from the case. No other interpretation thereof is possible. The instruction which was given on that subject and upon which the majority rely as curing the questioned instruction, is not accurate and could not have removed the positive impression given to the jury by the erroneous instruction. As phrased in the majority opinion, it read: "* * * that if it be found that the plaintiff sustained injury as the result of the introduction by the defendant of a new infection, an inference arose that the proximate cause of the injury was some negligence or malpractice on the part of the defendant which it was incumbent upon him to rebut by clear, positive and uncontradicted evidence that the injury occurred without any failure ot duty on his part." The instruction given, in fact, reads: "If, and only in the event, you should find that plaintiff, H. T. Moore, sustained injury as the result of the introduction by defendant, Elmer Belt, or any of his agents or employees, of a new infection you are instructed as follows: An inference arises that the proximate cause of such injury was some negligence or malpractice on the part of the defendant, Elmer Belt, or his agents or employees. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict in favor of plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that the injury in question occurred without being proximately caused by any failure of duty on his part, or on the part of any of his agents or employees.

"You are instructed that where an inference is permitted by law, that such inference is only a species of evidence, and where such inference is rebutted by clear, positive and uncontradicted evidence, then such inference is dispelled and disappears from the case." Manifestly, the instruction was in square conflict with the instruction on expert testimony and its effect would be erased from the minds of the jury. It would indicate to the jury that expert evidence was required under all circumstances.

In criticizing the instruction on res ipsa loquitur offered by plaintiff (but refused) the majority states that it omitted the requirement of proximate cause. While such issue is not mentioned in the instruction, *it had no place there,* for it dealt solely with the evidence required to establish negligence. It was not a formula instruction. It reads: "In determining whether defendant's learning, skill and conduct fulfilled the duties imposed on him by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard, I remind you, was set up by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing in the same locality at the same time. It follows, therefore, that except as hereinafter explained the only way you may properly learn that standard, is through evidence presented in this trial by physicians and surgeons called as expert witnesses.

"However, there is this exception to the rule just stated: when it is a matter of common knowledge that danger is involved in certain conditions or to take certain precautionary measures, as, for instance, failure to perform the commonly known duties of cleanliness or sterilization, expert testimony is not required to establish such a fact, but it may be judicially noticed as a part of that fund of common knowledge shared by us with our fellow citizens generally.

"This exception may be otherwise stated as follows: When it is common knowledge that an event or a circumstance that has happened to or developed in a patient is of the kind that ordinarily does not occur in the absence of negligence on the part of the physician attending him, the question whether or not the condition was caused by negligence may be decided from the general circumstances as shown by the evidence and in the light of common experience and reason." The subject of proximate cause was properly and adequately covered in other instructions.

The majority opinion, in an endeavor to escape the holdings in Barham v. Widing, 210 Cal. 206, 291 P. 173, and other cases cited in connection therewith, has this to say: "In the cases cited where the doctrine was held applicable *evidence that the defendant did not cause the injury was remote* and it followed as a matter of common knowledge from the nature of the injury that the result would not happen without carelessness or negligence. In the present case the inference that the injury was not caused by the defendant, but from some source theretofore existing in the plaintiff's system, *was not remote* but could be drawn from substantial evidence in the record. Therefore the plaintiff has not necessarily brought the injury home to the defendant. Before the compelling inference based on common knowledge, which is at the root of the res ipsa loquitur doctrine, would be justified it became necessary for the plaintiff to eliminate himself as a proximate cause of the injury." The evidence was not "remote" that the defendant did not cause the injury in the cited cases. In the Barham case *the defendant and his nurse testified positively that the needle was sterilized.* The same is true of Bellandi v. Park Sanitarium Ass'n., 214 Cal. 472, 6 P.2d 508; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Dean v. Dyer, 64 Cal.App.2d 646, 149 P.2d 288; and Mastro v. Kennedy, 57 Cal.App.2d 499, 134 P.2d 865, 867. If it is meant by the quoted statement that all the evidence must "necessarily" show that defendant caused the injury, and that similarly it must all show that some independent physical condition of plaintiff was not the cause, then we have some strange law on res ipsa loquitur. The fallacy of the reasoning is pointed out in Mastro v. Kennedy, supra. There plaintiff suffered an infection in the jaw after the dentist had removed a tooth, and in the process administered a pain killer by hypodermic needle. The court there said:

"We may also accept as established facts, that immediately after the extraction there was no infection on the roots of the tooth nor in the sockets; that a serious infection set in which caused plaintiff much suffering and expense over a period of two years.

"The case of Barham v. Widing, 210 Cal. 206, 291 P. 173, 177, has features quite similar to those of the instant case. There, a dentist was accused of malpractice because he failed to sterilize the hypodermic needle used in injecting an anesthetic, and to sterilize the gums before extracting a tooth * * * [quoting from Barham v. Widing, supra]: 'As the court says in the case of Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312:

"'"If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

"'It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. * * *'

"Defendants seek to distinguish the instant case from the Barham case, because there, the infection started from the exact spot of the injection, while in this case it was in the general locality but not necessarily in the exact spot of the injections. This distinction is too tenuous to be sound. Here, the infection was in the region where the needle pierced the unsterilized gums, and the reasonable inference might follow, if drawn by the jury, that a germ on the unsterile gums was carried into the tissue on the needle and caused the infection. The result of an unsterile condition is a matter of common knowledge under the cases already cited.

"* * * The danger of infection from an unsterile instrument, or a dirty field of operation, is a matter of such common knowledge that a jury is authorized to draw the reasonable inference that an infection was caused by negligence where an unsterile instrument is used, or the operative field is not properly sterilized * * * [cases cited].

"In Roberts v. Parker, 121 Cal.App. 264, 8 P.2d 908, 910, a dentist was sued for malpractice where osteomyelitis of the jaw bone set in after an operation where no X-ray had been taken to determine the condition of the field of operation. Experts testified that under the standards of good practice prevailing in the community an X-ray should have been taken before the tooth was extracted. There was evidence introduced on behalf of the defendant tending to prove that the disease had its source other than in the extraction of a tooth. It was argued that there was nothing to show that the failure to use due care on the part of the dentist was the proximate cause of the osteomyelitis. In disposing of this argument the court said:

"'Therefore, if in spite of the testimony tending to show a different origin of the disease there be testimony to sustain the opposite conclusion which has been reached by the jury, its verdict must be sustained. In other words after the verdict of the jury has been fairly rendered, all the circumstances of the case, together with any reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Barham v. Widing, supra. Measured by the foregoing rules, the circumstances of the present case are legally sufficient to sustain the jury's verdict. Dimock v. Miller, supra; Barham v. Widing, supra; Ley v. Bishopp, supra.'"

There is clearly no basis for a distinction between the case at bar and Barham v. Widing, supra, so far as the applicability of the doctrine of res ipsa loquitur is concerned, and the attempted distinction in the majority opinion will not stand the test of intelligent unbiased scrutiny. If this doctrine is applicable to this case, then there can be no question but that the jury was erroneously instructed, and that such error was prejudicial to plaintiff.

I would, therefore, reverse the judgment.

TRAYNOR, Justice (dissenting).

I cannot agree that it was not prejudicially erroneous for the trial court to limit the testimony of plaintiff's only expert witness. In a field of law in which expert testimony is essential, the rulings below deprived plaintiff of a fair opportunity to prove the allegations of his complaint.

It was necessary for plaintiff to establish by competent evidence that (1) the infection was centered in the genito-urinary tract, (2) there was no infection, latent or chronic, when defendant made the examination, and that (3) the infection was caused by defendant's failure to exercise due care in the conduct of the examination, particularly in the sterilization of the instruments used.

Plaintiff does not dispute that there was no direct evidence tending to establish that defendant was negligent. It was not essential that he produce such evidence. Upon proof that the infection originated in the area examined and that it was not present before the examination, the jury could reasonably infer that the infection was introduced by the examination and therefore caused by the negligence of the defendant. It is common knowledge that infections do not ordinarily occur during medical treatment unless there is negligence. Barham v. Widing, 210 Cal. 206, 216, 291 P. 173. If the plaintiff establishes by expert testimony that his infection arose during medical treatment and that it would not ordinarily arise in the absence of negligent treatment, the jury may infer negligence on the basis of res ipsa loquitur. Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3; Bellandi v. Park Sanitarium Ass'n, 214 Cal. 472, 480, 6 P.2d 508; Barham v. Widing, supra.

Plaintiff could rely upon res ipsa loquitur, however, only if he established by expert testimony the first two elements of his case, the location of the infection and the nature of its origin, which are not matters of common knowledge. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350; Slimak v. Foster, 106 Conn. 366, 138 A. 153; Christie v. Callahan, 75 U.S.App.D.C. 133, 124 F.2d 285; see cases collected in 141 A.L.R. 5–50.

Plaintiff introduced the testimony of Dr. Frank Webb. After plaintiff's counsel had interrogated Dr. Webb about his educational background and professional experience, defense counsel raised doubts as to the witness' qualifications. The trial court permitted Dr. Webb to answer only one hypothetical question based on evidence before the court. He was not permitted to testify about his experience with diseases and infections of the genito-urinary tract, although the offer of proof in chambers indicated that he had considerable knowledge thereof. Plaintiff's counsel made it clear that "we are not asking the witness to testify as to the procedure that was used. We are asking him to testify as to the cause and nature of this infection." The trial court nonetheless refused to permit any further questioning about the location and nature of the infection upon defense counsel's objection that the witness was not an expert in the performance of cystoscopic examinations and had not seen one performed in Los Angeles in 1944. This ruling precluded the witness from testifying that the infection was not caused by a septic condition in the tract at the time of the examination and that the condition was not a local or systemic one originating before the examination. Plaintiff's case depended upon his ability to disprove those possibilities.

During the course of his examination, the witness stated that he assumed the examination had been competently conducted. On cross-examination, defense counsel asked the witness:

"Q. Doctor, from the hypothetical question that was propounded to you you assumed that the cystoscopic examination was made very competently and very thoroughly, did you not? A. Manipulation of the instruments or manual—what I mean to say is that the instruments or the manual manipulation of them was evidently very good.

"Mr. Sterry [defense counsel]: I move that the answer be stricken as not responsive to the question.

"Will you read the question? (The reporter reads the last question.)

"A. I assumed that—

"Q. Will you just answer that yes or no, doctor? A. I can answer that yes.

"Mr. Sterry: That is all."

On redirect examination, plaintiff's counsel asked Dr. Webb how he would explain his answer. Upon objection, the court refused to permit an answer to the question on the ground that there was no ambiguity in defense counsel's question or in the witness' answer. The record does not sustain that holding. From the offer of proof in chambers, it appears that Dr. Webb meant to testify only that the actual physical conduct of the examination was competent. He did not intend by that statement to express an opinion about the sterilization technique before the examination. Since he was not permitted to make that explanation, the jury was left with the impression that plaintiff's only expert witness approved defendant's conduct of the examination in all its phases. The prejudicial effect of the trial court's ruling is readily apparent. It has been repeatedly held that the refusal of a trial court to permit the witness to explain a yes or no answer is reversible error. McGuire v. Baird, 9 Cal.2d 353, 355–356, 70 P.2d 915; Webber v. Park Auto Transportation Co., 138 Wash. 325, 244 P. 718, 47 A.L.R. 590; 58 Am.Jur. 321.

The trial court refused to permit the plaintiff's witness to answer more than a single hypothetical question and expressed doubt as to his competence to testify at all. The approval of that ruling by the majority opinion throws an overwhelming burden of proof on the plaintiff in malpractice cases. The majority opinion states that the exclusion of Dr. Webb's testimony was not erroneous for the reason that "A medical expert is not qualified as a witness unless he is shown not only to have the required professional knowledge, learning and skill to express his opinion, but is also familiar with the standards required of physicians under similar circumstances." This statement and the cases cited in its support are inapplicable to the present case. It may be conceded that a medical expert called to testify that a defendant did not exercise that degree of care and skill ordinarily exercised by members of the profession under similar circumstances must be familiar with the standard of care prevalent among the members of the profession. A medical practitioner who testifies as to the standard of care ordinarily exercised by a specialist in a given case must either be a specialist himself or must show familiarity with the methods of such specialists. McGuire v. Baird, 9 Cal.2d 353, 356, 70 P.2d 915; Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 5. Dr. Webb, however, did not "testify to the degree of care against which the treatment given is to be measured." Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3. He was called to testify solely as to the location and nature of the infection, matters within the province of any competent medical practitioner. His degree of familiarity with cystoscopy technique and the conduct of cystoscopic examinations is irrelevant, for he was not called to testify about the technique or the standard of conduct of the examination. "The law does not require the best possible kind of a witness, but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice * * * the ordinary medical practitioner should be received on all matters as to which a regular medical training necessarily involves some general knowledge." 2 Wigmore, Evidence, § 569, p. 665. When the subject of inquiry is not the required standard of care but the nature of an ailment or its location, "a physician of practice and experience is an expert and * * * it is not necessary that a witness of this class should have made the particular disease involved in any inquiry a specialty in order to make his testimony admissible as an expert." Drucker v. Philadelphia Dairy Products Co., Inc., 35 Del. 437, 441, 166 A. 796, 798; Meiselman v. Crown Heights Hospital, 285 N.Y. 389, 398, 34 N.E.2d 367; Johnson v. Winston, 68 Neb. 425, 430, 94 N.W. 607; Young v. Stevens, 132 N.J.L. 124, 126, 39 A.2d 115; Hathaway's Administrator v. National Life Insurance Co., 48 Vt. 335, 351; Swanson v. Hood, 99 Wash. 506, 515, 516, 170 P. 135.

The testimony that plaintiff's witness was allowed to present demonstrates that he is a competent practicing physician familiar with general medical practice, that he has kept abreast of the latest developments by research and study, and that he has had experience with diseases and infections of the genito-urinary tract. Treatment of infections and knowledge of this nature, cause, and effect, are the stock in trade of the practicing physician. The growth of specialization does not disqualify a general practitioner from signalizing the existence of an infection in a patient's body merely because he is not a specialist on that part of the body where the infection exists. The trial court, therefore, committed error in holding that Dr. Webb was not qualified to testify as to the location of plaintiff's infection and to its probable time of origin.

The majority opinion holds that even if it were error to exclude Dr. Webb's testimony, it would not be prejudicial since Dr. Webb testified in reply to the one question he was permitted to answer over defendant's objection that he believed the infection was carried into the urinary tract by the examination. Defendant contends that the witness' answers to the other questions would have been merely reiterative of the reply to the first. The record does not support that contention.

It is true that Dr. Webb stated at the close of a lengthy answer to an even lengthier question that he believed the infection was carried into the urinary tract by the examination. This testimony was essential to plaintiff's case. It was also essential that plaintiff negative the possible causes of the infection suggested by defendant and his expert witnesses. The testimony excluded by the trial court would have constituted evidence by a qualified expert that the infection could not have been caused by the conditions relied upon by defendant. Plaintiff was entitled to have that evidence considered by the jury in opposition to the testimony of defendant's expert witnesses, and it was prejudicial error to deprive him of such evidence. Moreover, even as to the one question that Dr. Webb was permitted to answer, the prejudicial effect of the ruling is clearly apparent. The manner in which the trial court informed the jury that Dr. Webb was qualified to answer only one question indicated a low degree of belief in the witness' qualification,[1] and obviously had its effect upon the jury's consideration of the weight to be given that testimony. There is no doubt that considerations of lack of expertness are properly presented to the jury to govern the weight to be given the testimony. McGhee v. Raritan Copper Works, 133 N.J.L. 376, 377, 44 A.2d 388; Salmon v. Rathjen, 152 Cal. 290, 299, 92 P. 733. These considerations were properly raised by opposing counsel on cross-examination, but the trial court added strength to the argument of defense counsel by the manner of its ruling. It would be an extremely independent jury that, notwithstanding the cumulative effect of these several erroneous rulings, would choose to believe plaintiff's witness. Plaintiff was entitled to have his case stand or fall on its own merits, and insofar as the rulings of the trial court prevented its consideration thereon, the error was prejudicial.

Finally, it is contended that the extent of examination of an expert witness is within the discretion of the trial court and that its ruling will not be disturbed on appeal. The trial court, however, is not a final judge of the qualifications of an expert witness. Its ruling upon those qualifications is reviewable to determine whether there has been an abuse of discretion. The exclusion of a qualified expert because of an erroneous view of his qualifications is, as a matter of law, an abuse of discretion requiring reversal. Meiselman v. Crown Heights Hospital, 285 N.Y. 389, 399, 34 N.E.2d 367; Johnson v. Winston, 68 Neb. 425, 430, 94 N.W. 607, 7 Wigmore, Evidence, § 2090, p. 454.

Plaintiff produced a competent medical witness to testify to matters within the knowledge of all competent medical practitioners. This much he was properly required to do. In erroneously excluding that witness' relevant testimony the trial court abused its discretion and effectively denied plaintiff a fair opportunity to prove his case. Meiselman v. Crown Heights Hospital, 285 N.Y. 389, 399, 34 N.E.2d 367. I would therefore reverse the judgment.

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[1] "I am allowing him to answer that one question only that I think he is qualified to answer, and you will give it that belief to which you believe that it is entitled."

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

95 Cal.App.2d 381

PEOPLE v. RENNERT et al.

Cr. 4398.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1949.

Hearing Denied Jan. 26, 1950.

Max Rennert and Julius Chris Fisherman were convicted of robbery in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., and they appealed.

The District Court of Appeal, Doran, J., held that evidence sustained the conviction and affirmed the judgment.

1. Robbery ⟹24(1)

Evidence sustained conviction for robbery.

2. Criminal law ⟹517(1)

That defendant at first denied any guilt, did not render inadmissible in prosecution for robbery evidence of confession which followed later inquiries.

3. Criminal law ⟹528

Where a co-defendant's confession was repeated to the other defendant at the conclusion of which defendant replied "that's not quite right" such evidence was properly admitted in robbery prosecution.

4. Criminal law ⟹386, 1186(4)

In robbery prosecution, where victim testified that since robbery she had had telephone calls from people she didn't know regarding her indentification of the defendants and that she did not recognize the voice of the persons calling, admission of such testimony was error but was not prejudicial. Const. art. 6, § 4½.

John J. Bradley, and Max Solomon, Los Angeles, for appellants.

Fred N. Howser, Attorney General; William E. James, Deputy Attorney General, for respondent.

DORAN, Justice.

The defendants are charged by information with three counts of robbery. Adjudged guilty by a jury, the appeal herein is from the judgment and the order denying a motion for a new trial.

[1] The facts briefly are as follows. On September 18, 1948 about 10 a. m. Louis Harmell answered the door bell; "that upon opening the door a man confronted him with a gun in his right hand and forced himself and Mrs. Harmell, who was directly behind him, into the living room of the residence where they were forced to sit down; shortly thereafter a second party entered through the front door holding his hand in his pocket simulating a gun; that after the Harmells were forced to sit down in their living room the colored maid, Ardalia Smith and her girl friend, Mamie Simpson, came to the living room from the rear of the house and were also forced to sit down in the front room. That upon gaining entrance to the Harmell residence and while in the living room, the first party to enter demanded from Mr. Harmell his valuables and money, taking several hundred dollars; that this party also instructed Mr. Harmell to take off his ring, to which Harmell replied 'that ring will cause you nothing but trouble—it is a Masonic ring and I don't think it will do you any good'. That the Masonic ring being worn by Mr. Harmell was valued at about $400.00 or $500.00." Money and other valuable jewelry was taken. The victims were taken to the back bedroom, bound and placed in a closet.

Defendants were arrested two or three months later. At the trial Ardalia Smith and Mamie Simpson identified defendants; Mr. and Mrs. Harmell were not "sure".

Two officers testified to a confession by defendant Rennert and to the further fact that when Rennert's confession was restated to defendant Fisherman the only reply was, "That's not quite right."

It is contended on appeal that "the verdict is contrary to the law and the evidence"; that the court erred in admitting certain testimony.

A review of the record reveals the evidence to be sufficient.

[2] With regard to the evidence of the confession, appellant appears to believe that because the defendant at first denied any guilt, that evidence of the confession which followed later inquiries is inadmissible. There is no such rule; evidence of the confession on such circumstances is properly admitted.

[3] It appears from the record that defendant Rennert's confession was repeated to defendant Fisherman at the conclusion of which defendant Fisherman replied, "That's not quite right." It is contended that the court's ruling on defendant Fisherman's objection to such evidence was error. The evidence was properly admitted. As pointed out by respondent, "It will be noted that this statement ('That's not quite right') was not a flat denial, but was certainly an equivocal statement, susceptible of the inference of guilt."

It appears from the record that someone had telephoned the witness Mrs. Harmell in connection with which the following question was asked on direct examination, "Now, since that occasion, since the robbery, have you had any telephone calls from people you didn't know regarding your identification of these defendants? A. Yes, sir." Objections followed which were overruled. Then followed, "Q. By Mr. Johnson: And did you know who that person was either by recognizing the voice or by having them identify themselves? A. No, sir."

[4] It is contended that the admission of such testimony was error and prejudicial. It may be conceded that the ruling was error but it does not follow that such evidence was prejudicial. On the contrary it appears of little importance and therefore must be disregarded. Article VI, section 4½ of the Constitution, in effect, so provides.

There are no prejudicial errors in the record, wherefore the judgment and orders are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

95 Cal.App.2d 151

PRITCHARD et al. v. CRESTLINE VILLAGE MUT. SERVICE CO. et al.

Civ. 3882.

District Court of Appeal, Fourth District, California.

Dec. 16, 1949.

Rehearing Denied Jan. 11, 1950.

Hearing Denied Feb. 8, 1950.

Action by Ernest L. Pritchard and others against Crestline Village Mutual Service Company, a corporation, and others, for declaratory relief to determine voting rights of shareholders in the corporation.

The Superior Court of San Bernardino County, A. D. Mitchell, J., entered judgment for defendants and plaintiffs appealed.

The District Court of Appeal, Barbard, P. J., held that general corporation law was applicable and that each shareholder of corporation was entitled to one vote for each share held, and affirmed the judgment.

1. Waters and water courses 🔑186

A mutual stock corporation formed to furnish water to stockholders at cost was a "non-profit corporation" in the sense that there could be no distribution of profits to shareholders prior to dissolution.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Non-profit Corporation".

2. Corporations 🔑13

The General Corporation Law is applicable to non-profit corporations existing at time of adoption of law unless such corporations are expressly excepted from the operation of that title or unless some special provision with relation to a particular class of corporation is inconsistent therewith. Civ.Code, §§ 279, 283, 285, 290, 294, 300b, 303, 320.

3. Waters and water courses ⚷186

Where by-laws of non-profit stock corporation formed under General Corporation Law to supply water to stockholders provided for voting rights in proportion to shares held and corporation had been formed and operated under General Corporation Law, voting rights were property rights not affected by revision of General Non-profit Corporation Law, and stockholders would not be required to vote as members. Civ.Code, §§ 277 et seq., 279, 283, 285, 290, 294, 300b, 303, 320, 593 et seq., 604, 605d.

4. Waters and water courses ⚷186

Where by-laws of non-profit stock corporation formed under General Corporation Law to supply water to stockholders provided for voting rights in proportion to shares held, and corporation had been formed and operated under General Corporation Law, voting rights were property rights not affected by the Corporation Code, and stockholders would not be required to vote as members. Corporations Code, §§ 100 et seq., 119, 9000 et seq., 9001, 9002.

5. Corporations ⚷186

Where General Corporation Law was applicable to non-profit mutual stock corporation formed thereunder to furnish water to stockholders at cost, revision of General Nonprofit Corporation Law, which provided for membership vote regardless of shares owned, but not affecting nonprofit corporations already in existence and in which certain definite property rights had been acquired, and the Corporations Code, which provided that no right accrued before Code went into effect would be affected, did not affect corporation, and where voting rights of corporation under by-laws were in proportion to shares held, each shareholder would be entitled to one vote for each share held. Civ.Code, §§ 277 et seq., 279, 283, 285, 290, 294, 300b, 303, 320, 593 et seq., 604, 605d; Corporations Code, §§ 100 et seq., 119, 9000 et seq., 9001, 9002.

John W. Preston, John W. Preston, Jr., Los Angeles, for appellants.

Surr & Hellyer, San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief to determine the voting rights of shareholders in a corporation. The plaintiffs contend that this is a nonprofit corporation with one class of membership, the members having equal voting rights; that the capital stock, as such, represents no voting power; and that the issued shares are merely evidence of single memberships regardless of the number of shares owned by any individual. The defendants contend that the voting rights rest in the owners of the outstanding capital stock in proportion to the number of shares owned.

The defendant corporation was organized in 1924 under the name "Crestline Village Mutual Water Company No. 1", with an authorized capital stock of $25,000 divided into 2500 shares of the par value of $10 each. Its Articles of Incorporation stated that it was formed for the purpose of furnishing water at cost to its stockholders in proportion to the number of shares held by each, and further stated "it being the intent and purpose of this corporation to be mutual and without profit to any of its stockholders."

In May, 1932, the Articles of Incorporation were duly amended as follows: 1. the name was changed to "Crestline Village Mutual Service Company"; 2. the number of shares was increased from 2500 to 7500, to be without par value and to be of one class only; 3. the corporation was to have perpetual existence; 4. the stated purposes were increased to cover a number of services, other than supplying water, including the maintenance of roads and the supplying of electric energy, sewerage facilities, garbage disposal, and fire, police and sanitary protection. The amended articles further provided "that the corporation is not formed and does not exist with a view of pecuniary gain or profit to its shareholders," and that it "shall conduct its business and operate its property as a nonprofit cooperative corporation for the exclusive use and benefit of its shareholders, and without any profit accruing to them from the business of the corporation." The additional 5000 shares thus provided for were issued to another corporation in exchange for its assets. That corporation was then dissolved and these 5000 shares were distributed in liquidation to its shareholders. There is no evidence that the company ever engaged in furnishing any of the permitted services, other than the supplying of water. It does appear that this corporation has, for many years, owned property of a considerable value.

The by-laws of the corporation provide, among other things, that certain shares of stock were attached to specific lots within the described area to be served by the company; that unattached shares could be attached at the request of their registered owners, who should designate the lot to which the share was to be attached; that the attached shares passed with the title to the lots to which they were attached, unless expressly reserved with the approval of the directors; that water was to be furnished only where a share was attached to a lot; and that a share could be divided into ten equal parts, and one or more parts attached to a particular lot. These fractional shares, when attached to lots, carried rights to water service equal to full shares but the holders of fractional shares had only a fractional vote. Treasury shares were not issued to purchasers of lots. At the time of the trial there were 1350 shares of Treasury stock which had never been issued, and 6150 shares of issued stock of which 2369 were attached to lots. The defendant Whitelock owned 3773 shares of the issued stock, only two of which were attached to lots.

From 1924 to 1940, one Charles Mann, the original Crestline subdivider, owned and voted the controlling stock of the defendant corporation. In October, 1940, the defendant Whitelock acquired from Mann approximately 3900 shares of this stock, together with some vacant lots and a considerable acreage of unsubdivided property. Since acquiring the Mann shares in 1940, Mr. Whitelock has been president and manager of the corporation and has owned and voted the controlling stock therein. Since that time he has opened up three subdivisions containing 491 lots and has sold about half of them, transferring to each purchaser and causing to be attached to the particular lot a share, or fractional share, of the stock theretofore held by him.

In July, 1947, an amendment was added to the by-laws of the corporation, by the written assent of the controlling shareholders, which permitted the directors to impose an annual maintenance charge upon lots within the district, not exceeding $25 per lot, for the purpose of providing additional revenue for operating expenses, additions and improvements, the payment of indebtedness and other corporate purposes. Pursuant thereto, the directors immediately "levied" a maintenance charge of $17 per lot for the year 1947.

The levy of this maintenance charge led to the bringing of this action, which was filed in December, 1947. After a trial the court found, so far as material here, that the defendant corporation was organized and existing pursuant to the provisions of the General Corporation Law and not pursuant to any of the provisions of Title 12, Article 1 of the Civil Code; that the voting power of shareholders is determined by the number of shares each owns, each being entitled to one vote for each share of stock; and that this corporation does not have or consist of "any member or members", and never has been a corporation of that character. As a conclusion of law, it was found that this corporation is organized and existing under the General Corporation Law and not as one organized or existing under the terms of Title 12, Part 4, Division 1 of the Civil Code, or under the provisions of Part 1, Division 2 of Title 1 of the Corporations Code. Judgment was accordingly entered which repeated this conclusion of law and expressly adjudged that each record holder of a share, or a fractional share, is entitled to vote upon the basis and at the rate of one vote for each share of stock held. From this judgment the plaintiffs have appealed.

[1] Admittedly, the corporate respondent is a nonprofit corporation in the sense

that there can be no distribution of profits to shareholders, prior to dissolution. From the beginning it has provided for and issued shares of stock, and its by-laws have provided for voting rights in proportion to the shares held. The question presented, in view of its nonprofit character, is whether it is a stock corporation organized and existing under the General Corporation Law or whether it must be held to be a membership corporation, with equal voting rights among the members, regardless of the number of shares held by them. Incidentally, the appellants contend that the nonprofit corporation law, as it existed in 1924, when this corporation was first formed, did not authorize the formation of stock corporations, since section 653u of the Civil Code then provided, among other things, that "such corporation shall not issue capital stock, but shall issue a membership certificate to each member. Its business shall not be carried on for profit." Not only does it rather clearly appear that this corporation was not organized under the provisions of Title XXII, in which section 653u then appeared, but Title XXII as it then existed was repealed in 1931 with the express provision that all corporations formed thereunder should thereafter exist under the General Corporation Law, Stats. 1931, p. 1840.

Appellants' main contention is that this is a nonprofit corporation under the provisions of Title 1, Div. 2, Pt. 1 of the Corporations Code; that the Nonprofit Corporation Law, as therein set forth, provides only for membership corporations and does not authorize the formation of stock corporations; and that it follows that the voting rights of this nonprofit corporation are now vested in its members, each having but a single vote.

In 1931, the corporation laws were extensively revised, the "General Corporation Law" being placed in Title 1, Pt. 4 of Div. 1 of the Civil Code, and the "General Nonprofit Corporation Law" being placed in Title 12 of that part and division. Stats. 1931, Ch. 862 and 871. There are apparent inconsistencies between some of the provisions of these two general laws. The statements made in each of them with reference to its own application and its relation to the other, with various exemptions and exceptions, are somewhat confused. As a result, the application of these laws, respectively, to a particular set of circumstances is not as clear as could be desired.

Title 12 provided that a nonprofit corporation "may" be formed for religious, charitable and like purposes, including the rendering of services; that the Articles of Incorporation "shall" state certain things, including the number and qualifications of its members; that the corporation shall keep a membership book; and that every member of such a corporation shall be entitled to one vote unless otherwise provided in the articles or by-laws. There was a further provision, Sec. 604, that a nonprofit corporation shall not issue shares of stock, but that membership therein may be evidenced by certificates. Section 605d provided that this General Nonprofit Corporation Law "shall extend to all nonprofit corporations now existing or hereafter formed, so far as applicable," unless there be a special and inconsistent statutory provision relating to any class of such corporations. That section further provided that the provisions of the General Corporation Law (Title 1) should apply to corporations "formed under this title, except as to matters specifically covered by this title", and that for this purpose "shareholder" shall include "member" and "shares" shall include "memberships."

On the other hand, the General Corporation Law (Title 1) contains a number of provisions which seem to indicate that a corporation may be formed under that title for any lawful purpose, and that it was intended to apply to some nonprofit corporations. Such provisions are found in Sections 279, 285, 290, 294, 300b, 303 and 320, as contained in that title. Section 279 states that the provisions of that title "are applicable to every private corporation, profit or nonprofit, stock or nonstock, now existing or hereafter formed," and the present and future securities thereof, unless such corporation be expressly excepted from the operation thereof, or unless there be a special provision with respect to a particular class which is inconsistent therewith. That section then provides: "The existence of corporations heretofore formed or existing shall not be affected by the enactment of this title nor by any change in the requirements for the formation of corporations nor by the amendment or repeal of the laws under which they were formed or created." In the report of the Legislative Counsel it was stated that while this section covered the same ground as the former section 283, the language had been revamped "to expressly include nonprofit" corporations, and their outstanding and future securities, "where no special provisions exist," and to provide that the existence of the corporations theretofore formed should not be affected by the revised title.

[2] The General Corporation Law (Title 1) is thus made applicable to a nonprofit corporation then existing unless such corporation was somewhere "expressly excepted" from the operation of that title, or unless there was some special provision with relation to a particular class of corporation which was inconsistent therewith. It further provided that the existence of corporations theretofore formed should not be affected by the enactment of that title, by any change in the requirements for the formation of corporations, or by the amendment or repeal of the laws under which they were formed. In view of the definite and express provisions thus contained in section 279, it should not be held that the vague and uncertain provisions of section 605d in Title 12 prevented the continued existence of this corporation as one existing under the General Corporation Law. The corporation had been given life and effect by the issue of stock, which had been exchanged for assets which enabled the company to operate, and the stock structure had become and was an integral part of the corporation's existence. While section 605d provided that the provisions of Title 12 should extend to nonprofit corporations then existing or thereafter formed "so far as applicable," other statutory provisions were here applicable and in force. That this result was intended is further indicated by the fact that the act revising Title 12 contained the provision, in Section 2 thereof, that "This revision shall not affect the existence of any corporation heretofore formed". Stats. 1931, Ch. 871, p. 1858.

[3] While it would seem from the language used in Section 605d that the provisions of Title 12, as then adopted, were intended to apply to nonprofit corporations thereafter formed, and under some circumstances to such corporations theretofore existing, it would also seem from the language used in that section, in the saving clause set forth in the act revising Title 12, and in the express and definite provisions of section 279 in Title 1, that it was not intended to interfere with nonprofit corporations which were then existing, in which certain definite property rights had been acquired, and with respect to which it was so definitely provided that their existence "shall not be affected." If it had been intended to affect the continued existence of such a corporation as that here in question, and to compel it to completely change its fundamental form and structure, with the resulting interference with accrued property rights, this should have been clearly and definitely stated by the legislature, with a corresponding provision for the protection and disposal of the property rights theretofore existing. We think this would have been done had such an intention existed. In our opinion, therefore, the clear, definite and express provisions in Title 1 prevailed here over the vague and indefinite provisions in Title 12, and after the 1931 revision of the corporate laws the respondent corporation remained a stock corporation, although it contained nonprofit provisions and was operated for the benefit of its stockholders.

[4, 5] We think the same considerations apply with respect to the provisions of the Corporations Code, which was adopted in 1947. In that code, the General Corporation Law is set forth in Div. 1 of Title 1, and the law with respect to nonprofit corporations is set forth in Div. 2 of that title. While the distinction between general corporations and nonprofit corporations is more clearly set forth in the Corporations Code than it was in the 1931 re-

vision of the corporation laws, there is little difference between the two in the respect here in question. In the Nonprofit Corporation Law (Tit. 1, Div. 2) Section 9002 makes the provisions of the General Corporation Law (Tit. 1, Div. 1) applicable to corporations formed under Div. 2 except as to matters specifically otherwise provided for therein. Section 9001 is a little more definite than the old section 605d of the Civil Code, and makes the provisions of the Nonprofit Corporation Law applicable to nonprofit corporations, whether then existing or thereafter formed, unless the corporation was expressly exempted from the operation thereof. However, the act adopting the Corporations Code (Stats. 1947, Ch. 1038) provided among the general provisions that "no right accrued" before this code went into effect "is affected by the provisions of this code". Moreover, section 119 of the Corporations Code, which is in Title 1, Div. 1 thereof, contains almost the exact language that was used in former section 279 of the Civil Code. We therefore hold that the existence of the respondent corporation, as theretofore formed and existing, was not affected by the adoption of the Corporations Code, or by the provisions of Div. 2 of Title 1 thereof. It appears from the evidence that valuable property and assets were exchanged for most, if not all, of the stock of the respondent corporation. It would violate all due process of law to deprive the owners of that stock of their property rights therein without compensation, and to compel them to assume the status of mere members, in a different form and kind of corporation, with the same rights as those held by other members who had contributed little or nothing to the corporate assets. We think that this result is not compelled by our corporation laws, past or present, and that the trial court correctly found and held that the respondent corporation was organized and now exists under and pursuant to the provisions of the General Corporation Laws of this state; that it does not now come under the provisions of Part 1, Div. 2 of Title 1 of the Corporations Code; and that the voting power of this corporation rests with the record owners of the stock thereof, each shareholder being entitled to one vote for each share of stock held.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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95 Cal.App.2d 144

PRITCHARD et al. v. WHITELOCK et al.

Civ. 3876.

District Court of Appeal, Fourth District, California.

Dec. 16, 1949.

Hearing Denied Feb. 8, 1950.

Proceeding by Ernest L. Pritchard and others against Frank L. Whitelock, Frank C. Russell and Helen F. Leffen, individually and as members of the board of directors of Crestline Village Mutual Service Company, a nonprofit corporation, to enjoin defendants from collecting an assessment.

The Superior Court of San Bernardino County, A. D. Mitchell, J., entered judgment and decree for plaintiff and defendants appealed.

The District Court of Appeal, Barnard, P. J., held that the assessment levied against the lots, irrespective whether lots had shares attached or service connection, as a maintenance charge not authorized under bylaws, was void, and affirmed the judgment.

1. Corporations 🔑180

Where the holder of the majority of the issued stock in a corporation has the controlling voting power in the affairs of the corporation, equity will hold the majority stockholders to a strict observance of all provisions of the articles and by-laws under which they purport to act.

2. Waters and water courses 🔑186

Invalid assessment levied by directors, and constituting a lien against lots owned by stockholders of non-profit corporation formed to furnish water to stockholders at cost, would be enjoined, notwithstanding directors did not plan to enforce and collect levy.

3. Waters and water courses ⚿186

Where by-laws of non-profit corporation formed to furnish water to stockholders at cost provided shares were to attach to lots in area serviced and pass with title thereof, assessment levied against lots, irrespective of whether lots had shares attached or service connection, as maintenance charge, not authorized under by-laws and not related to amount of water used or furnished to respective lots or to cost of production and delivery, was void as beyond power of corporation, and its collection would be enjoined upon petition of minority shareholders.

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Surr & Hellyer, San Bernardino, for appellants.

John W. Preston, John W. Preston, Jr., Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment holding that section 7.24 of the by-laws of Crestline Village Mutual Service Company is invalid; decreeing that an "assessment, or maintenance charge," of $17 per lot levied against each lot in the district is void and unenforceable; and enjoining the defendants, individually and as directors of that corporation, from collecting or attempting to collect "said assessment or levy" or any part thereof.

This action involves the same corporation as does the case of Pritchard v. Crestline Village Mutual Service Company, Cal.App., 212 P.2d 526, this day decided. The three defendants herein were all of the directors of that corporation. Of the 6150 issued shares of stock the defendant Whitelock owned 3773 shares, only two of which were "attached" to any lot within the district served by the company. 2369 issued shares were attached to lots within the district, but 1500 of these lots had no actual water connection. There were also other lots within the district which had no share attached and no service connection.

The by-laws of the corporation authorized the directors to levy assessments upon all the issued shares of stock provided that the same amount should be assessed against each share; authorized the corporation to levy and collect from the shareholders water tolls and charges and to make such tolls and charges a lien against the shares; authorized the directors to fix the charges or tolls payable for water furnished, for other services rendered, and to levy, collect and enforce assessments against the shares of stock; provided that all charges are made a lien upon the shares and may be foreclosed if the charges are not paid; and provided that before delivery of water should be made to any lot, a share of stock must be designated for that purpose, and that the share is then deemed "attached" to the lot so designated.

In June, 1947, the defendant Whitelock mailed to each stockholder a letter stating that "We have 2369 shares of outstanding stock that is assessable," and suggesting that "if an assessment of $30.00 per share were levied" this would bring in an amount sufficient to pay the company's debts, make certain improvements and pay operating expenses, with a small surplus. At a meeting of the stockholders of the company on July 26, 1947, a motion that the directors be instructed to levy an assessment of $30 per share on the entire issued stock was opposed by Mr. Whitelock, who owned the unattached shares, and defeated by votes representing a majority of the stock. Thereupon a motion was made to instruct the directors to provide for a $17 assessment against each lot instead of against shares of stock. This motion was carried.

After the stockholders' meeting adjourned and on the same day, the board of directors, upon their own written consent as majority stockholders, adopted section 7.24 of the by-laws. This section provides that an annual "maintenance charge" may be imposed for the purpose of providing additional revenue for operating expenses, improvements, paying debts and other corporate purposes; that this charge shall be a stated amount for each lot within the "district", as such district is provided for in section 7.10 of the by-laws; that for convenience the maintenance charge is referred to as "levied against the lots"; that the charge for any year shall be fixed by the directors and shall not exceed $25 per lot; that the owner of any lot shall be personally liable for the payment of such maintenance charges levied against such lot; and that all provisions of the by-laws applicable to assessments, tolls and charges shall be applicable to "the maintenance charges and its collection." Section 7.10 of the by-laws, thus referred to, provides that the expression "district" as used in the by-laws "means all those certain lots and land area at Crestline (including Skyland in the San Bernardino Mountains) under the water distribution system of the Company on July 27, 1946, or capable of being served therefrom, and such other lots and land area as the Board of Directors may from time to time by majority vote add to or include within the area to which water will be delivered by the company." On the same day, July 26, 1947, the board of directors adopted a resolution ordering "that a maintenance charge of $17.00 per lot for the year 1947 be and the same is hereby levied against the lots of the District pursuant to the provisions of section 7.24 of the by-laws."

This action was brought by three of the lot owners, who were also shareholders, on their own behalf and for all other shareholders of this corporation who were similarly situated. The court found, among other things, that the articles of incorporation of this company do not authorize or empower the corporation or its board of directors to levy assessments against the lots of its customers or members; that the board of directors had, and has, power to fix a reasonable amount to be charged for water; and that the levy of $17 against each lot in the district did not and does not bear any proper relation to the amount of water used and the cost of production and delivery thereof to each lot. As conclusions of law, it was found that under the articles of incorporation the power of the corporation to collect water charges must bear a reasonable relation to the amount of water used and to the cost of production and delivery thereof; that the assessment or levy of $17 per lot was made for the purpose of retiring the capital indebtedness and to provide additional working capital, and was not a proper charge for water or a proper maintenance charge; that both by-law 7.24 and the assessment or levy of $17 per lot made thereunder are void; that the act of making this assessment or levy was beyond the power of the corporation; and that the plaintiffs and those represented by them are entitled to an injunction restraining the defendants, both as individuals and as directors of the corporation, from collecting or attempting to collect this assesement or a levy of $17 per lot. Judgment was entered accordingly, and the defendants have appealed.

[1] It may first be observed that while the holder of the majority of the issued stock in this corporation had certain rights, including a controlling voting power in the affairs of the corporation, as was held in the companion case, that very fact creates a situation which might well lead to an abuse of that power in a corporation organized for the mutual benefit of its stockholders, and to a use of that power which would unfairly and unjustly affect the rights of the minority stockholders. Under such circumstances it would seem clear that, in reviewing any act done through the use of such power, a court of equity should carefully consider the entire situation and should hold the majority stockholders to a strict observance of all provisions of the articles and by-laws under which any such action is purportedly taken. The maintenance charge here in question was apparently adopted, and intended, as a substitute for an obviously illegal assessment. The question whether it was within the legal powers conferred upon the directors should be carefully scrutinized, and those powers strictly construed.

The appellants first contend that the complaint in this action stated no cause of action against them; that in adopting the the resolution levying this maintenance charge they, as the board of directors, acted for the corporation and not for themselves; that theirs was a corporate act; that when the resolution was adopted they, as directors, were finished with their task; that there is nothing to suggest that they intend or threaten to take any future action; that any steps later taken to collect this maintenance charge will necessarily be those of the corporation; that the corporation itself was not made a party to the action; and that an injunction of this character cannot be issued to redress a wrong which has already been consummated.

[2] The complaint alleged that the defendants, acting together as the board of directors, unless restrained, will assert a lien against the plaintiffs' shares of stock and the shares of all other lot owners in said area, and will attempt to sell their said stock and will thereby create a cloud upon the title of the lots of all such stockholders in said area. The president and majority stockholder testified that a large amount had been paid under this levy and that payments were being collected daily. The only possible inference from the evidence, as a whole, is that the intention was and is to proceed to collect the amounts thus levied, and to use the proceeds for certain purposes unless the officers of the corporation are prevented from so doing. The argument made is more ingenious than convincing. The corporation could act only through these officers and directors, who are the defendants here, and the judgment runs against them individually and as members of the board of directors. It is idle to say that they intended no further action and that their only wrongful act had already been consummated. If it be assumed that the appellants will take no further action toward enforcing and collecting this levy they are in no way aggrieved by the judgment as entered. The judgment runs against the directors of the corporation as such and, with respect to the first point raised, no valid reason appears why it should be set aside.

The only other point raised by the appellants is that the $17 levied is a valid service and maintenance charge, that it was authorized by a by-law adopted by the written consent of the owners of a majority of the stock and levied by a resolution regularly passed by the board of directors, and that there is no evidence to show that the charge thus made was an unreasonable one.

[3] The articles of incorporation authorized the corporation to levy and collect from the shareholders water tolls and charges, to make such tolls and charges a lien against the shares of stock, to withhold delivery of water while any such charges were delinquent, and to withhold transfer of shares while subject to the lien of any unpaid tolls or charges. The corporation was also authorized to levy equal assessments upon the issued stock of the corporation. There was no provision in the articles authorizing the corporation to levy assessments or charges against lots in the district, as such. Article 7.24 of the by-laws, as adopted immediately prior to this levy, is not only inconsistent with the articles of incorporation but purported to authorize a maintenance charge "levied against the lots", to be imposed upon each and all of the lots in the district as provided for in section 7.10 of the by-laws. That section provided that the district, as used in the by-laws, included all of the lots in two mountain communities which were under the water distribution system of the company, or capable of being served therefrom, and also such other lots as the board of directors might from time to time add to or include within the area. It is conceded that no services were supplied by this corporation other than the furnishing of water through its existing water mains, that 1500 lots in the district which had attached shares had no actual water connections, and that there were other lots within the district which had neither shares attached nor service connections. It further appears, as the court found, that the maintenance charge thus levied bore no reasonable relation to the amount of water used or furnished to the respective lots, or to the cost of production and delivery to such lots. How such a corporation, because it hoped at some time in the future to supply water to some of its shareholders throughout a somewhat indefinite and expandable area could, by calling it a maintenance charge, directly levy an assessment or charge upon lots owned by persons not connected with the corporation and not receiving water, is not explained. This purported levy was not only not authorized by the articles of incorporation, but it amounted to an attempted assessment against all of

the lots within a certain area which was likewise beyond the power of the corporation. The court's findings and conclusions are supported by the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

95 Cal.App.2d 128

SACKETT v. STARR.

Civ. 3890.

District Court of Appeal, Fourth District, California.

Dec. 15, 1949.

Action by Kenneth J. Sackett against E. G. Starr on a count seeking specific performance of alleged contract to sell real property and on a count seeking specific performance based upon doctrine of equitable estoppel, wherein defendant by cross-complaint asked that his title be quieted.

From a judgment of the Superior Court of Orange County, Robert Gardner, J., in favor of defendant on his cross-complaint, the plaintiff appealed.

The District Court of Appeal, Griffin, Acting P. J., affirmed the judgment. The court held that action could not be based on an escrow agreement in view of fact that the defendant had not signed the agreement or consented to its execution, and that evidence sustained trial court's finding that owner and his broker did not know that plaintiff was selling his own property for purpose of making the purchase and that therefore there was no basis for estoppel.

1. Specific performance 🔑25

Escrow instruction agreement prepared by title company at instance and suggestion of prospective purchaser without owner having at any time signed the agreement or consented to its execution furnished no basis for action for specific performance of alleged contract to sell. Civ.Code, § 1624.

2. Frauds, statute of 🔑116(5)

Under statute, a contract to sell real property is void unless it is in writing and subscribed by the party to be charged or by his agent, and if signed by an agent, the agent's authority must be in writing subscribed by the party sought to be charged. Civ.Code, § 1624.

3. Contracts 🔑15, 16

Mutual consent is necessary to the existence of any contract, and there can be no contract unless the minds of the parties have met and there is an offer and an acceptance.

4. Principal and agent 🔑103(7)

Generally, authority of an agent to sell is simply authority to find a purchaser and is not authority to execute a contract to convey.

5. Vendor and purchaser 🔑28

Letter by owner to title company stating that owner was not executing proposed escrow instruction agreement, that if prospective purchaser desired to make purchase he could deposit cash with the title company, that letter was not to be construed as an option nor as an agreement to sell, and reserving the right to sell the property to others without notice, did not constitute a contract to convey. Civ.Code, § 1624.

6. Specific performance 🔑31

Specific performance will not be compelled unless contract contains all material terms. Civ.Code, §§ 1550, 1565.

7. Specific performance 🔑121(4)

In action for specific performance of alleged agreement to sell real property, evidence among other things that escrow instruction agreement was prepared by title company at suggestion of prospective purchaser and was never signed by owner, that letter addressed by owner to title company referred to the instructions as proposed instructions relating to a possible purchase and specifically stated that it was not to be construed as an option or as an agreement to sell, supported finding that alleged agreement was incapable of being specifically enforced. Civ.Code §§ 1550, 1565, 1624.

8. Specific performance 🔑3

Estoppel which is relied upon as basis for specific performance in connection with sale of property must be based on showing that pursuant to terms of contract and induced by representations of opposing party, the one relying on the estoppel has changed his position to his detriment, and the intent to make such change must be known at the time to the one making the representations.

9. Appeal and error 🔑1009(1)

In action for specific performance in purchase and sale of real property based upon equitable estoppel, whether owner and broker knew that purchaser was selling other property of his own for purpose of securing money and making a deposit on the property of owner was for determination of trial court.

10. Appeal and error 🔑1009(2)
Specific performance 🔑121(3)

In action for specific performance in purchase and sale of real property based upon equitable estoppel, evidence supported finding that owner and broker had no knowledge that purchaser was selling property of his own for purpose of securing money and making a deposit on the property of owner, and accordingly finding could not be disturbed on appeal.

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George H. Tobias, Santa Ana, Lloyd S. Nix, Robert F. Tyler, Los Angeles, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondent.

GRIFFIN, Acting Presiding Justice.

The amended complaint upon which the cause was tried sets forth two counts. In the first, plaintiff seeks specific performance of an agreement, based upon certain preliminary negotiations and written correspondence, for the purchase and sale of certain real property located in Riverside County. In the second count he seeks specific performance in the purchase and sale of the same property based upon the doctrine of equitable estoppel. Defendant answered the complaint, denied generally its allegations, set up an affirmative defense, and by way of cross-complaint asked that his title be quieted. After trial, the court refused specific performance and entered judgment for defendant on his cross-complaint. Plaintiff appealed.

The La Cienega, the property here involved, is a part of an old Spanish land grant. It is contiguous to Los Pinos and El Cariso tracts located in the mountains about 15 miles above Lake Elsinore. These three parcels have been owned by defendant since 1930. Plaintiff and one Stewart, his father-in-law, since 1926, operated a partnership for the purpose of raising cattle in the same general area. They owned two parcels of land, one known as the "Mountain Ranch" and the other as the "Valley Ranch". The Valley Ranch was used in conjunction with the Mountain Ranch in their livestock operations. Plaintiff and his partner became interested in the acquisition of the three parcels belonging to defendant. Through one Richards, a real estate broker, plaintiff agreed to purchase from defendant these three ranches for a consideration of $25,000, payable $10,000 by deed of trust and the balance cash, $500 of which was paid on the opening of an escrow which called for an additional $1500 by April 14, 1946, and $13,000 on demand of escrow. This escrow agreement was dated March 14, 1946, and was signed by both plaintiff and defendant. No money, other than the $500, was deposited in this escrow, and on April 24, 1946, the seller terminated it, apparently for the reason that plaintiff failed to deposit the amount of money required within the time specified. In conjunction with this termination defendant, on April 25, wrote the title company a letter which reads in part as follows: * * * Sackett has not complied with his obligations under the terms of the escrow instructions dated March 14, 1946. * * * This letter will confirm my instructions of April 24, 1946, that said escrow is terminated * * * You are to return to me all documents deposited by me in said escrow. All sums deposited by * * * Sackett are to be applied first to the payment of your charges and the remainder remitted to me."

Thereafter, about June 20, 1946, according to plaintiff's testimony, he went to defendant's office and asked defendant if he would be interested in selling the La Cienega property only. He told defendant that he could pay $15,000 cash for it but that in order to do so it would be necessary for him to sell the "Valley Ranch"; that defendant thereupon told him to contact Richards, his representative, who would act for him in such sale and would handle the negotiations for him. Plaintiff then testified that he contacted Richards and that Richards told him defendant had authorized him to make the sale of the La Cienega property for $15,000 cash; that on July 2 Richards directed the plaintiff to go to the title company and have Mr. Baxter, an escrow agent, prepare the escrow; that he also told Richards that he was selling the "Valley Ranch" in order to raise the purchase price for the La Cienega Ranch; that immediately thereafter plaintiff went to the title company and discussed the proposed sale with Mr. Baxter, who prepared escrow instructions which were then and there signed by the plaintiff; that the deposit of $500, which plaintiff had previously placed with the escrow company under the former escrow, which had been previously canceled, was transferred into the new escrow; that on July 12, at the instance of Richards, he placed an additional $1500 into this escrow.

It appears that the escrow instructions of July 2, 1946, signed only by plaintiff, were not sent to defendant until July 29. By letter dated August 5, 1946, addressed to the title company, defendant replied that he was not executing the proposed escrow instructions. It reads in part as follows:

"I do not desire to enter into any long term escrow on this property * * * If Mr. Sackett wishes to purchase the subject property, he can deposit with you in cash the full amount of the purchase price. Upon notice from you that you are ready to pay me said purchase price, I will send you a duly executed grant deed in the same form heretofore proposed by me.

"This letter is not to be construed as an option, nor is it an agreement to sell. I reserve the right to sell the subject property or otherwise dispose of it without notice. It is my intention merely to inform you the conditions under which Mr. Sackett might be able to purchase the lands.

"I notice in the proposed escrow instructions that Mr. Sackett is attempting to recoup the $500.00 deposited by him with you under the terms of an escrow agreement dated March 14, 1946, which was terminated by me as of April 24, 1946. As stated in my letter * * * all sums so deposited by him are to be applied first to the payment of your charges and the remainder remitted to me."

It appears that on August 27, 1946, defendant entered into an escrow agreement with one Nina Anderson, selling the La Cienega Ranch to her for the sum of $15,000. Prior to this date plaintiff disposed of the Valley Ranch and on August 26, went to the title company and presented Baxter with a draft in the sum of $14,611.03. The escrow agent then read to plaintiff the defendant's letter of August 5, and plaintiff was informed that defendant was negotiating with others relative to the possible purchase of the same property. According to plaintiff's testimony, the escrow agent called defendant on the telephone and defendant told the escrow agent not to accept plaintiff's check unless Nina Anderson, who was also interested in the purchase, should fail to pay the agreed purchase price by 2 o'clock of the following afternoon, and the check for $14,611.03 was returned to plaintiff; that plaintiff immediately contacted Richards and tendered the check to him; that a day or so later the check was returned to plaintiff by Richards with the explanation that the defendant Starr had entered into a purchase and sale agreement with a party by the name of Anderson and therefore would not complete the sale of the La Cienega Ranch to plaintiff.

It is apparent from the record that defendant did not, at any time, in any writing, authorize or employ Richards as his agent to sell or convey the property. It is likewise clear that the defendant never signed the escrow instructions of July 2, 1946.

Defendant Starr denied generally plaintiff's claimed conversation had with him in reference to an agreement of sale of the La Cienega Ranch, as indicated by plaintiff. He testified that plaintiff came to his office in May, 1946, and that he told him that he was "not desirous of doing business with him or his father-in-law"; that "* * * in order to get into my good graces that he should instruct Mr. Baxter * * * to release the $500.00; that I understood that was to be as a forfeiture in the escrow of March"; that he never told him that Mr Richards had any authority to enter into the negotiations for him; that he never heard about plaintiff's "Valley Ranch" until he heard plaintiff's testimony in the courtroom; that he never asked him to sell it or knew anything about such a sale; that he first learned of the proposed escrow of July 2 when the copy came to him by letter of transmittal from Mr. Baxter on July 29; that he never learned that plaintiff had left $1500 additional deposit with the title company in reference to this escrow; that on July 30 he had a telephone call from Richards in which he "probably talked to me about the deal" but that he told him that he was not interested in dealing with Sackett or the Stewarts; that he did tell Baxter, when he called in reference to the Anderson deal, that if the Anderson deal did not go through that he would think it over and let him know whether he would deal with Sackett or not; that Baxter did call him and tell him that Sackett was in with a check and wanted to deposit it in connection with the July 2 escrow and that he told him that he was not at all interested in that, that there was a deal with Nina Anderson and that if the Anderson deal did not go through he would consider Sackett's proposition.

The real estate broker, Richards, testified generally that he did act as agent in the escrow agreement of March, 1946, but that plaintiff failed to make the payments under that agreement and the escrow was canceled; that in June, 1946, plaintiff asked him to find out if he could buy the La Cienega Ranch from defendant Starr; that Starr told him he would be willing to sell it if it brought $15,000 cash, but he did not want to give an option on it and if plaintiff wanted to put that amount up he could have it; that Starr said when the cash was "put up" he was to be notified and the deal would go through "if there was no other deal pending"; that on July 2, plaintiff came to see him; that he did not have time to go with him to the title company and that he told him to see Mr Baxter and make a deposit in escrow and Mr. Baxter would handle the deal for him; that he had no knowledge that plaintiff was selling his "Valley Ranch" for the purpose of supplying the money for the purchase of the La Cienega Ranch or otherwise; that at no time did he have any authority in writing from defendant Starr respecting the sale of any of these lands. He denied generally all of the claimed conversations plaintiff had with him in respect to the sale of the La Cienega Ranch except as above noted.

[1] It is apparent that the escrow instruction agreement of July 2, 1946, was prepared by the title company at the instance and suggestion of plaintiff Sackett. Defendant Starr never, at any time, signed this agreement or consented to its execution. Plaintiff's cause of action, therefore, cannot be predicated upon this document.

[2-4] Under Section 1624 of the Civil Code a contract is void unless it is in writing and subscribed by the party to be charged or by his agent, where it is for the sale of real property, and if signed by an agent, the authority of the agent must be in writing subscribed by the party sought to be charged. Mutual consent is necessary to the existence of any contract, and one cannot be made to stand on a contract to which he never consented. Cummings v. Ross, 90 Cal. 68, 27 P. 62. There can be no contract unless the minds of the parties have met and mutually agreed. Marx & Rawolle v. Standard Soap Co., 42 Cal.App. 32, 183 P. 225; Los Angeles Immigration & Land Co-operative Ass'n v. Phillips, 56 Cal. 539; 6 Cal.Jur. 43, sec. 24. There must be an offer or proposal and an acceptance of the same. Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; 6 Cal.Jur. 58, sec. 33. It is the general rule that authority to an agent to sell is simply authority to find a purchaser, but does not authorize the agent to

execute a contract to convey. Grant v. Ede, 85 Cal. 418, 24 P. 890, 20 Am.St.Rep. 237; Lambert v. Gerner, 142 Cal. 399, 403, 76 P. 53; Wilson v. White, 161 Cal. 453, 460, 119 P. 895; Salter v. Ives, 171 Cal. 790, 792, 155 P. 84; Holland v. McCarthy, 173 Cal. 597, 600, 160 P. 1069; Gold v. Phelan, 58 Cal.App. 471, 476, 208 P. 1001; Holway v. Malloy, 70 Cal.App.2d 317, 320, 160 P.2d 893.

[5] The letter of August 5 does not bring plaintiff within the provisions of sec. 1624 of the Civil Code. It refers to the instructions signed by plaintiff as the "proposed instructions" relating to a "possible purchase"; and states that defendant was "not executing the proposed escrow instructions"; that if he desired to make the purchase he could deposit the cash with the title company. The letter was only addressed to the title company and not to plaintiff, and specifically stated it was not to be construed as an option nor as an agreement to sell, and defendant specifically reserved the right to sell the property to others without notice and provided that the $500 paid into the first escrow was not to be considered a part of the purchase price.

[6] Specific performance will not be compelled unless there is a contract containing all the material terms. Beal v. United Properties Co., 46 Cal.App. 287, 189 P. 346; **Evarts v.** Johnston, 34 Cal.2d 6, 206 P.2d 633; Masten v. Griffing, 33 Cal. 111; Secs. 1550 and 1565, Civ.Code; 6 Cal. Jur. p. 19, sec. 6.

[7] The letter clearly indicates that the defendant did not mean by his letter that there was to be a clear and unequivocal offer which would be accepted by the deposit or tender of the money. The trial court specifically found: (1) that the defendant did not, in writing, promise to sell or convey to plaintiff, nor did he make any offer to sell or convey to him "the above-described property"; (2) that it is not true that in reliance upon any promise or offer of defendant, plaintiff tendered any sum of money for the property; (3) that it is not true that defendant, at any time, in any writing, authorized or employed Richards, as defendant's agent, to sell or convey the property. The evidence supports the trial court's finding that such claimed agreement was incapable of being specifically enforced, under the law applicable.

[8-10] As to the second cause of action the court found that it is not true that by any statement, representation, promise, concealment or conduct, defendant, at any time, personally or through any agent, induced plaintiff to sell his "Valley Ranch" or to raise or obtain funds for the purchase of the real property described or to change his position in any way; and that it is not true that plaintiff sustained any damage.

Plaintiff's testimony is that the sale of the "Valley Ranch" was made for the purpose of purchasing the La Cienega Ranch and that in reliance upon the representations made by the defendant, he was induced to change his position to his detriment and that defendant had *knowledge of this fact* and that he was therefore estopped from claiming the invalidity of the contract, citing such cases as Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Bacon v. Kessel, 31 Cal. App.2d 245, 87 P.2d 857; and Sessions v. Southern California Edison Co., 47 Cal.App. 2d 611, 118 P.2d 935.

The testimony of the defendant Starr and of the broker Richards, is in conflict with the testimony of plaintiff in this respect.

In Albany Peanut Co. v. Euclid Candy Co., 30 Cal.App.2d 35, 38, 85 P.2d 471, the rule is succinctly stated and it emphasizes the fact that before estoppel can arise it must be shown that pursuant to the terms of the contract, and induced by the representations of the opposing party, one must have changed his position to his detriment, and the intent to make such change *must be known at the time* to the one making the representations. The cases relied upon by plaintiff are distinguishable in this respect. Defendant Starr and the broker Richards each testified that they had no knowledge of the fact that plaintiff was selling his Valley Ranch for the purpose of securing money and making a deposit on the La Cienega Ranch, and the trial court was the one to determine this fact. As indicated by its findings, it decided the conflict adversely to the plaintiff. There is evidence to support the trial court's finding and it cannot be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Dickey v. Pattison, 92 Cal. App.2d 659, 207 P.2d 1081.

Judgment affirmed.

MUSSELL, J., concurs.

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95 Cal.App.2d 183

Ex parte WEBBER.

Cr. 2632.

District Court of Appeal, First District,
Division 1, California.
Dec. 20, 1949.

Petition for habeas corpus by Richard Webber.

The District Court of Appeal, Peters, P. J., discharged writ previously issued and remanded petitioner to custody, holding that under controlling statute, petitioner who had been convicted of rape, could be placed on probation on condition that he serve two years in county jail.

1. Criminal law 🔑1208(1)
Habeas corpus 🔑30(3)

Under statute, no person may be sentenced to county jail upon conviction of a misdemeanor for a period in excess of a year, and a person so sentenced may seek his release on habeas corpus. Pen.Code, § 19a.

2. Criminal law 🔑982

The statute which prohibits commitment in county jail for more than one year, of a person sentenced to confinement in county jail on conviction of misdemeanor, or as a condition of probation, or for any reason, did not preclude placing a defendant convicted of felony of rape on probation on condition that defendant serve two years in county jail. Pen.Code, § 19a.

3. Courts 🔑91(1)

Where no federal constitutional question was involved in habeas corpus proceeding, District Court of Appeal was bound by ruling of Supreme Court adverse to petitioner's contention.

William K. Coblentz, San Francisco, attorney for petitioner.

Fred N. Howser, Attorney General of the State of California, Clarence A. Linn, Deputy Attorney General of the State of California, attorneys for respondent.

PETERS, Presiding Justice.

Petitioner pleaded guilty to an information charging him with rape, a felony. His motion for probation was granted, and he was placed on five years' probation on the condition that he serve two years in the county jail. After having served one year and three months of this period, he filed this petition for habeas corpus on the ground that any confinement in the county jail in excess of one year is void under the provisions of § 19a of the Penal Code.

The portion of the section upon which petitioner relies reads as follows: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year." The section was amended in 1949. Stats. of 1949, p. 2422, Chap. 1390, § 10. That amendment became effective after this petition was filed. The amendment in no way affects the problem here involved.

[1, 2] There can be no doubt that, under this section, no person may be sentenced to the county jail upon conviction of a misdemeanor for a period in excess of one year, and that, if he is so sentenced, at the end of a year, he may seek his release on habeas corpus. In re Chiapetto, 93 Cal.App.2d 497, 209 P.2d 154; In re Phair, 2 Cal.App.2d 669, 38 P.2d 826; In re Howard, 69 Cal.App.2d 164, 158 P.2d

408. In the present case, the writ was granted in order to determine whether the same rule should apply to imprisonment in the county jail imposed as a condition of probation in felony cases The question has already been answered by the Supreme Court adversely to petitioner in Re Marquez, 3 Cal.2d 625, 45 P.2d 342. In that case, as in the instant one, the petitioner pleaded guilty to an information charging him with rape, and his motion for probation was granted. He was placed on probation for twenty years on condition that he serve the first four years in the county road camp. After serving one year, he applied for habeas corpus, basing his petition on the identical grounds urged by petitioner Webber. The Superior Court granted the writ and the State appealed. The Supreme Court reversed the order of discharge. The court held that § 19a had to be construed with § 1203 of the Penal Code as it then read, now § 1203.1, Penal Code, which expressly permits the trial judge in granting probation in felony cases as a condition thereof to "imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law" for the offense, and that, so construed, § 19a was not applicable to felony cases. The conclusion of the court was expressed in the following language, 3 Cal.2d at page 629, 45 P.2d at page 344: "After consideration of these several sections, we are led to concur in the views of appellant as to the purport of section 19a. To ascertain the meaning of the statute, the phrases used therein must be construed in connection with the phrases with which they are associated, and the particular expressions qualify those which are general (maxim of ejusdem generis, as codified, section 3534, Civ.Code; People v. McKean, 76 Cal.App. 114, 243 P. 898). Thus it is clear that section 19a relates solely to misdemeanor cases and may not be invoked by this defendant who is on probation under conviction of a felony. To be more specific, the provision of section 19a that no person sentenced to confinement in county or city jail 'on conviction of misdemeanor, or as a condition of probation, or for any reason' shall be committed for a period in excess of one year, merely limits the term of confinement in city or county jail in misdemeanor cases to one year, whether such confinement is the result of conviction, judgment, and sentence of imprisonment, or whether it is ordered as a condition of probation, or for any other reason. The statute places no limitation upon the term of a probationary period ordered spent in a road camp in a felony case. It follows that the power of the court to place defendant in a road camp was limited, as to period of confinement, only by the maximum possible term of his sentence (sec. 1203, supra)."

Another case on all fours with the instant one, and which followed the Marquez case, is In re Tantlinger, 8 Cal.App.2d 157, 47 P.2d 301.

[3] The arguments made by petitioner constitute a direct attack on the rule of the Marquez case, and, in effect, amount to a request to overrule that case. There being no federal constitutional question involved, as an intermediate appellate court we are bound by the rule of that case.

The writ heretofore issued is discharged, and the petitioner is remanded to custody.

WARD and BRAY, JJ., concur.

95 Cal.App.2d 73

In re SARGAVAK'S ESTATE.

KURKJIAN et al. v. SARAVAKIAN et al.

Civ. 17064.

District Court of Appeal Second District, Division 1, California.

Dec. 14, 1949.

Rehearing Denied Jan. 4, 1950.

Hearing Denied Feb. 8, 1950.

Proceeding in the matter of the estate of Ruby Sargavak, deceased, wherein H. Kurkjian and others filed a will contest opposed by Arkoohi Saravakian and others on the ground of lack of testamentary capacity of the decedent.

From a judgment notwithstanding the verdict of the jury in favor of contestant in the Superior Court of Los Angeles County, Wm. B. McKesson, J., the contestants appealed.

The District Court of Appeal, Doran, J., reversed the judgment, holding that while the trial court was authorized to enter a judgment notwithstanding the verdict in appropriate case in probate proceedings tried before a jury, the trial court was not authorized to grant such a motion where there was a substantial conflict of evidence in respect to the question of competency of the testator which the jury determined in favor of the contestant.

See also 203 P.2d 827.

1. Judgment ⊂⊃199(3.9)

The power of the trial court to order a judgment notwithstanding the verdict is subject to the same rules as the power to grant a nonsuit or to direct a verdict.

2. Judgment ⊂⊃199(3.7)

In a will contest tried before a jury which returned a special verdict for contestant, trial court was thereafter authorized to grant a motion for judgment notwithstanding the verdict if there was no substantial evidence presented by contestant in support of the special verdict. Probate Code, §§ 371, 373.

3. Judgment ⊂⊃199(3.6)

In will contest tried to the jury where there was a substantial conflict in evidence in respect to the question of competency and the jury rendered a special verdict to the effect that testatrix was incompetent when will was executed, trial court should not have annulled a verdict by granting respondents' motion for judgment notwithstanding the verdict.

4. Judgment ⊂⊃199(3.10)

A motion for judgment notwithstanding the verdict can be granted only when disregarding conflicting evidence and giving to the evidence favoring the party for whom the verdict was returned all the value to which it is legally entitled, indulging in every legitimate inference in his favor which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support the verdict.

5. Judgment ⊂⊃199(3.2)

In making an order granting a motion for judgment notwithstanding the verdict, the trial court may not weigh all the evidence of both sides or judge credibility of the witnesses as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true unless on its face it should be inherently incredible, and such rules are applicable to probate proceedings tried before a jury.

6. Trial ⊂⊃143

It is a function of the jury to resolve conflicts in evidence.

◆

Cameron & Perkins, Long Beach, for appellants.

Robert M. Dulin, Beverly Hills, and Melvin E. Fink, Los Angeles, for respondents.

DORAN, Justice.

Ruby Sargavak died in Los Angeles on March 22, 1947, leaving a will dated July 9, 1945. This will was admitted to probate without contest; thereafter appellants, as heirs at law, filed a "Contest of Will after Probate, alleging that when the will was executed, Ruby Sargavak was mentally incapacitated." There was a trial by jury; defendants' motions for non-suit and for a directed verdict were denied, and the jury returned a special verdict that at the time of signing the alleged will, Ruby Sargavak was not of sound mind. The trial court thereafter granted a motion for judgment notwithstanding the verdict, ordering that the former probate of decedent's will "be not revoked." The appeal is from the judgment so entered.

It is appellants' contention that "The verdict of a jury in a will contest case is not merely advisable, but it is mandatory on the trial court to enter judgment pursuant to and in accordance with, the jury's verdict". Appellants' brief also states that "A motion for judgment notwithstanding the verdict may be properly granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict." Testimony given by various witnesses is then quoted, which appellants insist, furnishes "substantial evidence from which the jury could reasonably infer that Mrs. Sargavak was of unsound mind".

Respondents' brief maintains that the Probate Court has the power to enter a judgment non obstante veredicto, and that the record in the present case fails to show any lack of competency to execute the will, and that it was a proper case in which to enter such a judgment notwithstanding the verdict. A résumé of the evidence, respondents insist, indicates that while testatrix' "intellectual faculties were considerably enfeebled", nevertheless there was no substantial showing of testamentary incompetence.

Appellants' contention that in a will contest the trial court has no authority to grant a judgment notwithstanding the verdict is predicated upon Section 371 of the Probate Code which provides that "Any issue of fact involving the competency of the decedent * * * *must be tried by a jury,* unless a jury is waived"; and Section 373 providing that "The jury must return a special verdict upon the issues submitted to them by the court; and *upon the verdict* * * * the court must render judgment, either admitting the will to probate or rejecting it." (Appellants' italics.) Likewise Section 382 dealing with contests after probate, states that "a trial by jury must be had", and that "if the jury shall find or the court shall decide that the will is invalid * * * the probate must be revoked."

[1, 2] The question whether a trial court is authorized to enter a judgment notwithstanding the verdict in such a case as the present has received consideration in various California cases, notably, In re Hettermann's Estate, 48 Cal.App.2d 263, 119 P.2d 788, 790, where the court said: "The law of this state regarding the power of the court to grant such a motion is well established and was stated by this court in Collins v. Nelson, 1936, 16 Cal.App.2d 535, 537, 238, 61 P.2d 479 * * *. As there held, the power of the court to order a judgment notwithstanding the verdict is subject to the same rules as the power to grant a nonsuit or to direct a verdict. * * * These rules are applicable to probate proceedings tried before a jury." In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25, 34, the reviewing court held that "there was no substantial evidence presented by contestant in support of the finding of the jury that Arnold was not of sound and disposing mind * * *. It was, therefore, the duty of the trial court to grant the motion for judgment in favor of proponents notwithstanding the verdict of the jury in favor of contestant." In re Estate of Green, 25 Cal.2d 535, 154 P.2d 692, 698, relied upon by appellants, merely holds that the verdict of a jury in such cases is not "advisory" but mandatory, and did not dispute the court's authority to grant, in a proper case, a motion for judgment notwithstanding the verdict. Indeed, it may be inferred that propriety of such procedure is assumed since the opinion says: "Reviewing the evidence under the rule * * * it is our opinion that the court did not err in denying proponents' motion for judgment notwithstanding the verdict." Appellants' contention that the trial court had no authority to enter such a judgment must therefore be resolved against such contention.

On July 9, 1945, the date of the disputed testament, Ruby Sargavak, the testatrix, was approximately 75 years of age. On the same day, Harry Sargavak, testatrix' husband, executed a similar will, each will leaving the estate to the survivor, with specific bequests in the same proportions to the same beneficiaries. Mrs. Sargavak's will was substantially the same as a previous testament executed in 1942 with the exception that certain charitable bequests were eliminated in the later will for the reason that gifts to charity had already been effected. Harry Sargavak died May 10, 1946, and testatrix died March 22, 1947, one year, eight months and thirteen days after execution of the will here under consideration.

Contestants and other witnesses expressed an opinion that the testatrix was of unsound mind when the will was executed. Such an opinion was given by nurses who had cared for Mrs. Sargavak in 1945 shortly before the will was executed. This opinion was based upon such facts as that testatrix thought there were devils in the room; that sometimes testatrix failed to recognize certain people; that after Mr. Sargavak died testatrix thought the husband was still alive; that Mrs. Sargavak had accused the nurses of flirting with Mr. Sargavak, aged about 80; that at times testatrix had no control over bladder or bowels, etc.

On the other hand, there was testimony by Attorney Channeson who prepared and witnessed the will, and who had known Mrs. Sargavak since 1903, that testatrix was not of unsound mind. In like manner, Dr. Boyajian, decedent's physician from April, 1945 until the date of death, expressed the opinion that testatrix was of sound mind when the will was executed. The physician further testified that Mrs. Sargavak had sustained a previous spinal injury and was suffering from a kidney condition and from hardening of the arteries; that testatrix had brief periods of mental cloudiness. Other witnesses, including ministers, nurses, neighbors and others having opportunities for observation, testified that testatrix was not mentally incompetent.

[3] The record therefore clearly indicates that a substantial conflict of evidence existed in respect to the question of competency. This, the jury, after hearing all of the evidence, resolved in favor of the contestants' claims, and rendered a special verdict to the effect that testatrix was incompetent at the time the will was executed. In this state of the record, it appears that the trial court should not have annulled the verdict by granting respondents' motion for judgment notwithstanding the verdict.

[4, 5] The rule in reference to the granting of a motion for judgment notwithstanding the verdict is well established. In re Estate of Hetterman, 48 Cal.App.2d 263, 266, 119 P.2d 788, 791 the court says: "Such an order can be made only when, disregarding conflicting evidence and giving to the evidence favoring the party for whom the verdict was returned all the value to which it is legally entitled, herein indulging in every legitimate inference in his favor which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support the verdict. In making such an order the trial court may not weigh all the evidence of both sides or judge of the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. These rules are applicable to probate proceedings tried before a jury."

In the respondents' brief it is conceded that the above rule is applicable, and that "the weight of the evidence cannot with propriety be argued upon here". It is contended, however, that "this does not mean that the testimony offered on behalf of the contestants must alone be considered, and that the trial court was entitled to look at the whole evidence, including that offered by the proponents", citing In re Estate of Smethurst, 15 Cal.App.2d 322, 59 P.2d 830, 834. In that case the reviewing court did so state, and said: "Also there need not be an absence of conflict in the evidence, for, to deprive the court of the right to exercise this power, there must be a *substantial* conflict, and that presupposes at least a comparison of the substance of the conflicting testimony of contestants and proponents." (Italics added.)

[6] That a substantial conflict exists in the evidence introduced by contestants and proponents, cannot be denied. Nor can it be denied that the function of a jury is to resolve such conflicts. It is evident that the power of a trial court to grant a judgment notwithstanding the verdict was never intended to oust a jury from its proper sphere of activity but was rather devised to insure that the jury keep within its proper limits. The procedure of granting a motion for judgment notwithstanding the judgment was designed solely to afford a remedy where a jury has returned a verdict supported by no substantial evidence. This is not the situation disclosed by the present record, and respondents' statement that "There was no evidence whatsoever of testamentary incapacity" is clearly incorrect. Since there is substantial evidence supporting the verdict, the jury's deter-

mination of the issue of fact involving testatrix' competency, must stand.

The judgment is reversed with direction to enter judgment for contestants in accordance with the verdict rendered.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied: SHENK and SCHAUER, JJ., dissenting.

95 Cal.App.2d 218

CARTER v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

Civ. 7726.

District Court of Appeal, Third District, California.

Dec. 20, 1949.

A. L. Carter brought proceedings for writs of prohibition and mandamus to the Superior Court in and for the County of Merced in regard to certain eviction actions pending therein against petitioner.

The District Court of Appeal, Per Curiam, denied the petition and discharged alternative writs issued by it, holding that petitioner failed to show that his remedy by appeal was inadequate.

1. Mandamus 🔑4(1)
Prohibition 🔑3(2)

Determination of question whether remedy by appeal is plain, speedy and adequate, so as to bar prohibition and mandamus, lies within court's discretion on particular circumstances of case.

2. Mandamus 🔑4(1)
Prohibition 🔑3(3)

Where factual issues, involved in proceeding for writs of prohibition and mandamus regarding eviction actions pending against petitioner in Superior Court, would necessarily be raised and decided by such court on trial of actions, and hence would be involved on appeal from judgment therein, petitioner failed to show that his remedy by appeal was inadequate and writs must be denied. Housing and Rent Act of 1947, as amended, 50 U.S.C.A.Appendix, §§ 1881–1902.

C. Ray Robinson and James A. Cobey, Merced, for petitioner.

Gregory P. Maushart, Dist. Atty., Merced, Griswold, Winton & Mayes, Merced, for real parties in interest.

PER CURIAM.

This court issued alternative writs of prohibition and mandamus directed to the respondent Superior Court in regard to certain eviction actions pending therein against A. L. Carter, the petitioner herein.

The pertinent allegations of the petition were that petitioner was the lessee of certain housing accommodations allegedly subject to the provisions of the Federal Housing and Rent Act of 1947, as amended, 50 U.S.C.A.Appendix, §§ 1881–1902; that Olen C. McDaniel, the owner of the leased premises and real party in interest, had not complied with the applicable federal regulations controlling the eviction of tenants, and that the respondent Superior Court, in entertaining the eviction proceedings pending against petitioner, was acting in excess of its jurisdiction. In addition, the petition alleged that the remedy by appeal was not plain, speedy and adequate.

The answer of the real party in interest, filed shortly before the oral argument, denied that the agreement under which the petitioner had entered into possession of the premises constituted a lease; denied that the premises involved herein were subject to said Federal Act and denied that petitioner's remedy by appeal was not plain, speedy and adequate. The cause was taken under submission at the conclusion of the oral argument subject to the filing of additional authorities by the parties upon the question thus raised and presented to this court.

[1, 2] It had become increasingly apparent to this court from the authorities filed and the correspondence in regard thereto that the parties are in hopeless conflict as to the factual issues involved in this proceeding. In addition, it appears that such issues will necessarily be raised and decided by the respondent Superior Court upon the trial of the actions now pending therein. Therefore it necessarily follows that the

same questions would be involved on appeal after judgment. The rule is that whether the remedy by appeal is plain, speedy and adequate lies within the discretion of the court upon the particular circumstances of the case. McDonough v. Garrison, 68 Cal. App.2d 318; 156 P.2d 983; Peck v. Municipal Court, 53 Cal.App.2d 267, 127 P.2d 668. The petitioner has failed to show that his remedy by appeal is inadequate and we are of the opinion that the writ should therefore be denied.

For the foregoing reason the petition is denied and the alternative writs are discharged.

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95 Cal.App.2d 126

KOSTER v. KOSTER.

Civ. 16997.

District Court of Appeal, Second District, Division 3, California.

Dec. 15, 1949.

Action by Rose Koster against Morris Koster for divorce.

The Superior Court of Los Angeles County, Wilbur G. Curtis, J., entered an interlocutory decree of divorce for defendant on his cross-complaint, and plaintiff appealed.

The District Court of Appeal, Vallée, J., held that evidence was sufficient to support findings of plaintiff's cruelty to defendant and affirmed the decree.

1. Divorce 🔑150(2)

In action by wife for divorce, trial court's finding that all allegations contained in defendant's cross-complaint seeking divorce on ground of extreme cruelty were true, was sufficient finding of extreme cruelty.

2. Divorce 🔑130

Evidence warranted granting of divorce to husband on his cross-petition on ground of wife's extreme cruelty.

Samuel Maidman and Joseph W. Fairchild, Los Angeles, for appellant.

A. Brigham Rose, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff and cross-defendant from an interlocutory decree of divorce granted defendant and cross-complainant on his cross-complaint. The court found that all of the allegations of the cross-complaint—which alleged extreme cruelty generally—were true.

[1] Appellant first says that the court erred in failing to make specific findings of fact as to cruelty. The contention is without merit. LaMar v. LaMar, 30 Cal.2d 898, 902, 186 P.2d 678; Melny v. Melny, 90 Cal. App.2d 672, 203 P.2d 588.

[2] Appellant claims that the evidence is insufficient to support the findings. This claim is also without merit. The evidence and the reasonable inferences to be drawn therefrom establish these facts. The parties were married November 18, 1934, and separated January 20, 1947, a little more than 12 years. Respondent is a pharmacist and was employed in a drugstore for many years preceding the commencement of the action. He labored from 7:00 a. m. to 10:00 p. m., six days a week. Appellant on many occasions told respondent she was going to spend every nickel he had and was going to break him. She was constantly placing respondent in the position of paying for fur coats and other wearing apparel that she bought on the installment plan. As a result, respondent was in a constant state of indebtedness. At the time of the separation she had 4 fur coats, 50 dresses, 30 pair of shoes, and a dozen pair of $10 nylon hose. She was constantly buying large quantities of cosmetics, liquor and drugs. She did not want any children and told respondent that she just married him for a meal ticket. On one occasion after appellant returned from a trip to Palm Springs, she told respondent that she had no use for him and that she had met a good dancer. While at Palm Springs, appellant was in the company of numerous men dancing and in cocktail bars. Appellant was a neurotic and hypochondriac, constantly going to doctors and unnecessarily incurring

large medical bills. There was evidence that appellant refused to have normal marital relations with respondent after the first few months of their marriage. There is much other evidence. No purpose would be served in detailing it. The evidence is amply sufficient to support the findings. See, Farmer v. Farmer, 79 Cal.App.2d 536, 537, 180 P.2d 55; Norris v. Norris, 50 Cal.App. 2d 726, 123 P.2d 847.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

PEOPLE v. LISS.

Cr. 4343.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1949.

Hearing Granted Jan. 12, 1950.*

Bella Liss was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of petty theft, and she appealed.

The District Court of Appeal, White, P. J., affirmed the judgment and held that evidence sustained conviction, that instructions were not erroneous, and that there was no error in admission and exclusion of evidence.

1. Criminal law 🔑1144(13)

On appeal from a judgment of conviction, District Court of Appeal is required to accept the facts in the light most favorable to the prosecution.

2. Larceny 🔑55

Evidence sustained conviction of petty theft.

3. Criminal law 🔑1159(2)

Where there is direct testimony that defendant was the perpetrator of the crime charged, defendant cannot procure a reversal of conviction on appeal unless defendant shows that such testimony was inherently unbelievable.

4. Criminal law 🔑781(4)

Instruction that if jury found that a voluntary confession was made, jury was exclusive judge as to whether confession was true, and that in deciding such question, jury should consider all circumstances connected with the making of the statement, as shown by the evidence, and that even if jury should find that confession was false, it remained evidence for jury's consideration, was not erroneous.

5. Criminal law 🔑741(3)

Confessions are to be weighed by jury in the same manner as other evidence.

6. Criminal law 🔑1178

When an appellant fails to cite any authorities or present any arguments to support a claim that certain instructions were improperly given, District Court of Appeal need not give consideration thereto.

7. Criminal law 🔑808½

Instructions on impeachment and credibility of witnesses, which merely set up guides to be followed by jury, which were mostly in language of statutes, which did not tell jury whom to believe or what to believe, and which did not tell jury to accept the testimony of the impeached witnesses, were not erroneous. Code Civ.Proc. §§ 1847, 2051, 2052, 2061.

8. Witnesses 🔑319

An impeached witness is not a totally discredited witness, and, though jury may disregard the testimony of an impeached witness, jury is not required to do so, but may accept or reject such testimony in whole or in part.

9. Criminal law 🔑778(11)

In prosecution for petty theft, evidence authorized instruction on flight. Pen.Code, § 1127c.

10. Criminal law 🔑1030(1)

Where no objection was taken at time of occurrence of alleged error in trial court, it is too late to urge the alleged error as error for the first time on appeal.

11. Criminal law 🔑656(1)

In prosecution for petty theft, remarks of trial court on testimony made in interest of a proper determination of the case and to prevent the jury from being misled were not improper. Const. art. 6, § 19.

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* Subsequent opinion 219 P.2d 789.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howzer, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of petty theft with a prior conviction of felonies, to wit: burglary and grand theft, a felony, in that on or about October 19, 1948, defendant did wilfully, unlawfully and feloniously take $27, the personal property of Von's Market. Defendant entered a plea of "not guilty as charged in the information", and subsequently admitted the prior convictions charged in the information. Motion for a new trial was denied. From the judgment of conviction, defendant prosecutes this appeal.

As grounds for reversal, it is urged, (1) the instructions given by the court were erroneous; (2) the verdict is contrary to law and the evidence, and the evidence is insufficient to support the verdict; (3) the court erred in the admission and exclusion of evidence in the case.

[1] Presenting the facts in a light most favorable to the prosecution as we are required to do following a guilty verdict, the record reveals testimony that on October 19, 1948, Morris S. Chalphon, a salesman employed by the Globe Bottling Company, was in Von's Market, which market was an account of his firm. It was between 5:10 and 5:20 p.m. and Mr. Chalphon was using a telephone in a booth which was some fifteen feet from the candy department in Von's Market. The cash register of the candy department was about the same distance from the booth and was within the vision of the witness. While he was telephoning, the witness saw defendant, with her back toward him, reach into the "island" of the candy department where the cash register was situated and ring the two-cent key of the register, whereupon the drawer opened, appellant put her hand in twice and took out two handsful of something which the witness was unable to identify, but he did see her place the contents from her hand into her handbag. Immediately after this, defendant circled the candy counter until she was some eight feet from where the witness was located. There was light in the place and the witness testified he was able to discern her features.

At about this time Boris Elkin, manager of the drug department at Von's Market, went to the aforesaid cash register and opened the same by pressing the key. Defendant started out of the store. The witness Chalphon walked over to Mr. Elkin, spoke to him, went to the door with him and pointed out the defendant to him. When Elkin went over to the register he noticed that all the $1 and all the $5 bills were missing from it. When the witness Chalphon pointed out the defendant to Elkin she was approximately forty or fifty feet from the doorway. Mr. Elkin hurried after her, caught up with her and as he moved toward her, defendant turned around and looked back in his direction. When he came up to her defendant said, "What is the matter?" Up to this time Mr. Elkin had not spoken to her. He then told her he would like to see her in the store for a minute but did not mention for what reason. Defendant asked, "What do you want to see me about?" and he replied that he would rather discuss that matter in the store than where they were. Defendant stated she was in a hurry to get home, whereupon he told her that it was of vital importance that he speak with her and that she should come back to the store with him. Defendant objected, stating, "I have nothing to talk about. I have to hurry home". At this time she started off across Santa Barbara Avenue in the direction of the doorway of the May Company department store.

Von's Market manager Mr. Elkin followed her and caught her just before she went into the door of the May Company, and suggested that she come back to the store with him because he wanted to talk with her and if she did not come with him he would call the police officer on the corner. Defendant thereupon said, "All right, I will go back with you then, I want to straighten things out." Up to this point Mr. Elkin had not told her what he wanted to talk to her about. Defendant and Mr. Elkin then proceeded back to the market and went inside to the candy counter.

At this time a Los Angeles city police officer appeared, having been summoned by two men who were sent after him by Mr. Elkin. The latter then informed defendant that money was taken out of the register and that she was observed taking such money therefrom. Defendant handed over her coin purse to him saying that this was her money and that she had not taken any of the market's money. Mr. Elkin examined the purse, and while he did not count the currency in it he noted that there were quite a few single dollar and $5 bills "bunched up" in the coin purse. At the candy counter, Mr. Elkin asked defendant her name and she told him it was "Sarah Wineburg" or "Sarah Winburg". While Mr. Elkin was speaking to the defendant the aforesaid police officer was standing at the far side of the candy counter about thirteen or fourteen feet away. Mr. Elkin said to the defendant, "Well, you did take the money from the register, didn't you?" To which she replied, "Yes". He asked her why she had taken it and she said she needed it for her sister. The purse was returned to defendant while Mr. Elkin went to get the manager of the grocery department and when they returned the purse was again taken from her. In the presence of the defendant and the officer, the grocery manager and Mr. Elkin made a check of the cash register. They counted all the change in the register, took a reading of the previous day's account and the instant day's business, discovering $36.89 missing out of the cash register. There was a tape on the register and Mr. Elkin testified that this tape showed a two-cent item on it. He testified that in the custom of his business the tape was sent to the office, and that when he went to get it to take it to the preliminary hearing he found it had been destroyed. Mr. Elkin also testified that the aforesaid two-cent item appeared on the tape immediately before the item of sale that he had rung up on the register following the time when Mr. Chalphon observed defendant at the register.

From the candy counter all parties proceded to the office located on the mezzanine floor of Von's Market. There defendant stated that if they would let her go she would give the money back. At the office the money in her purse was counted by the officers who had been called to the scene and they found five $5 bills, seventeen $1 bills, one half dollar, one dime, one nickel and seven pennies. Defendant at this time also told the officers that her name was Sarah Weinberg. From the office of Von's Market defendant was taken to University Police Station in the company of two patrol officers.

At the police station defendant asked permission of the detective on duty to speak with Mr. Elkin alone, which permission was granted. Defendant and Mr. Elkin were some ten or twelve feet away from the detective. Defendant said to Mr. Elkin, "Will you please have them let me go?", to which he replied, "Well, you did take the money didn't you?" Her answer was, "Yes." He asked her again why she had taken the money and her answer on this occasion was "that she was broke."

There is testimony in the record that Mr. Elkin did not make any promise of reward or immunity to the defendant and did not promise that he would let her go or that he would intercede in her behalf to the end that she might receive a light sentence. He testified that her statements were made freely and voluntarily and without duress, force or promise of reward. The witness Elkin specifically denied that he told defendant that he would let her go if she signed a statement that she had taken the money, and would return the same to him. Appellant was not an employee of Von's Market and had no permission to open the cash register or take anything out of it.

There is further testimony that while at University Police Station one of the arresting officers asked defendant why she took the money and she again replied because she was "broke". There was testimony that this statement was made without any force or violence being used upon her or without any promise of reward or immunity.

At the booking office in University Station defendant again gave her name as "Sarah Weinberg", but in a subsequent conversation with one of the arresting officers she gave her true name and denied taking the money, but when asked why she wanted to give it back replied that it was "just because she was a big-hearted person."

At the trial, defendant introduced no evidence nor did she take the witness stand in her own behalf to deny any of the aforesaid testimony.

[2, 3] Appellants' contention that the evidence is insufficient to support the verdict and that the latter is contrary to law is devoid of merit. A review of the foregoing testimony and of reasonable inferences that may be drawn therefrom, in the light of the well-established rule governing the power of an appellate tribunal to set aside the verdict of the jury upon the ground now under consideration, substantially supports the verdict arrived at by the duly constituted arbiter of the facts. People v. Alexander, 92 Cal.App.2d 230, 206 P.2d 657. Where as here, there is positive direct testimony that appellant was the perpetrator of the crime, before she can prevail on appeal, she must show that the testimony is inherently unbelievable. People v. Castro, 68 Cal.App.2d 491, 494, 495, 157 P.2d 25. There is no such showing in the case now under consideration. Furthermore, in cases where "* * * it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 490, 491, 165 P.2d 3, 10. Convinced that there was sufficient substantial evidence to justify the jury in finding appellant guilty we leave these contentions of appellant to the contrary to discuss the claim that the court erred in giving or refusing to give certain instructions.

In the course of the instructions given defining confessions and admissions we find the following language: "If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine under instructions."

[4, 5] We are not in accord with appellant's contention that by the foregoing language the jury was told that if they believed appellant had lied to the officers and market manager, the fact that she had lied tended in some manner to some degree to prove her guilt. The questioned language in the challenged instruction taken in connection with other parts of the same simply told the jurors that once they had determined that the confession was voluntarily made, it was in evidence to be considered by them in determining the true facts. Like all other evidence before them the jury was authorized to believe it or disbelieve it, and in so doing to assign it whatever weight they might see fit to give it. Confessions, standing as they do upon the same footing as other evidence, are to be weighed by the jury in the same manner. All parts are not necessarily entitled to the same credit and the jury may believe a part and reject the remainder of a confession, or may reject it in its entirety. Guilty persons sometimes make false confessions from various motives but the fact that a jury finds a confession to be false does not necessarily imply that an accused is innocent. The jury might infer that a confession was falsely made to gain the sympathy of those responsible for the maker's arrest or to otherwise delay or hinder prosecution, or to throw the officers off the scent. False statements made subsequent to the commission of an offense are admissible as indicating a consciousness of guilt. The fact that false statements take the form of a confes-

sion does not remove them from the foregoing rule, especially where, as in the instant case, there is ample evidence of guilt independent of the asserted confessions.

The foregoing language in the instruction does not tell the jury that they must, if they find the confession to be false, draw inferences therefrom unfavorable to the appellant, but merely says that the falsehood may be given such significance as the judgment of the jury may determine, leaving it clearly up to the jury as to whether they will consider the falsehood for or against the defendant. Furthermore, we fail to perceive wherein prejudice ensued to appellant from the instruction as given where, as here, other and independent evidence so clearly points to her guilt. She did not take the witness stand to deny the evidence presented against her or to brand the confessions as false. Manifestly, that part of the instruction which allowed the jury to consider the possibility of the falsity of the confessions and to draw an inference therefrom either favorable or unfavorable to appellant, could not have prejudiced her substantial rights.

The case of People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867, relied upon by appellant, is easily distinguishable from the case at bar. In the cited case the only evidence before the jury connecting the defendant with the commission of the crime was that found in his own confession, and if that fell, the case against him fell with it; consequently, if, under the instruction as given, the jurors concluded that his confession was false, there was no inference left for them to draw, which, in connection with other evidence in the case, would place the guilt of the crime upon the defendant. But in the instant case, a clear-cut case was made out against the defendant independent of her confessions. Also, the case of People v. Ford, supra, differs from the one now before us since the accused therein took the witness stand, and while admitting that he made the confession, denied the truth of it.

[6] With regard to two other instructions complained of by appellant numbered 29–A and 29–B, she cites no argument, points or authorities to show wherein they were improperly given. An examination of them discloses that they are correct statements of the law applicable to the issues tendered in the present cause. And it has repeatedly been held by the appellate courts of this state that when an appellant fails to cite any authorities or present any arguments to support a claim that certain instructions were improperly given, the court is not called upon to give consideration thereto. People v. Black, 45 Cal.App.2d 87, 98, 113 P.2d 746; People v. O'Connor, 44 Cal.App.2d 301, 302, 112 P.2d 279; People v. Burke, 43 Cal.App.2d 316, 318, 110 P.2d 685; People v. Buenaflore, 40 Cal.App.2d 713, 720, 105 P.2d 621; People v. Richardson, 74 Cal.App.2d 528, 532, 169 P.2d 44.

[7, 8] Equally without merit is appellant's contention that the trial court erred in instructing the jury on impeachment and credibility of witnesses. These instructions merely set up guides to be followed by the jury, and for the most part, are specifically set forth in sections 1847, 2051, 2052, and 2061 of the Code of Civil Procedure. In no way did these instructions tell the jury whom to believe or what to believe, nor did they, as contended by appellant, tell the jury to accept the testimony of an impeached witness. It is not the law of this state that an impeached witness is a totally discredited witness. While the jury may disregard the testimony of a witness who has been impeached, they are not necessarily required so to do. They possess the power to accept or reject such evidence in whole or in part. That is what the authorities hold and that is exactly what the challenged instructions say. People v. Ross, 46 Cal.App.2d 385, 397–398, 116 P.2d 81; People v. Holman, 72 Cal.App.2d 75, 89–90, 164 P.2d 297; People v. Duenas, 74 Cal.App.2d 846, 851–852, 169 P.2d 987. Evidence which appellant assumes constituted impeachment may not have been so regarded by the triers of fact.

[9] It was not error for the court to instruct the jury on flight in language practically the same as that contained in section 1127c of the Penal Code. Appellant asserts that the instruction should not have been given because there was no evidence of flight in this case. The instruction did not

purport to tell the jury that there was evidence of flight but merely advised them of the effect they might give to such evidence if it was found by them that there was flight. It must be assumed if not presumed that the jury followed the law as presented, and if flight was not proved, it was not considered in reaching a verdict. A reading of the testimony hereinbefore narrated, and not necessary to here repeat, immediately suggests the propriety of giving an instruction on flight. Suffice it to say there was testimony that appellant was seen placing her hand twice in the cash register of a store and then into her hand bag and immediately leaving the store and when accosted by the store manager, refusing to return to the store with him but continuing on her way into the nearby May Company store until the manager threatened to call the police. Such conduct might well be characterized as immediate flight, first in the absence of an accusation or probability of an accusation, and secondly, as attempted flight after being accosted by the store manager. Such actions upon the part of appellant may well afford persuasive evidence of a consciousness of guilt. Under the facts of this case no other inference can be reasonably drawn from the record than that appellant knew she might be or would be charged with theft. Therefore, she was not prejudiced by the giving of the instruction on flight.

Without argument or citation of authorities appellant insists that the court fell into error in refusing to give certain instructions proposed by her. Notwithstanding the rule hereinbefore referred to with reference to an appellant who fails to cite any authorities or make any argument in support of grounds urged for reversal, we have examined the instructions in question and are satisfied that they were properly refused for the reason that the principles of law therein enunciated were fully and fairly covered by other instructions, that they dealt with questions not within the province of the jury or referred to principles of law not applicable to the issues framed by the information or raised by the evidence.

Finally, appellant contends that the claimed error of instructions concerning impeachment was "accentuated by the error of the trial court in attempting to interpolate before the jury the effect of evidence offered by way of impeachment."

In support of this claim appellant refers to an occasion during the trial when the witness Morris S. Chalphon, who observed appellant while she was at the cash register, was on the witness stand. The record reflects the following:

"Q. (By Mr. Lavine, appellant's counsel) Now, at this preliminary hearing, this testimony you read this morning, you were asked this question—

"Mr. Carr: Page?

"Mr. Lavine: Page 6, Line 13: (Reading.) 'Q. Could you see whether or not she took anything out of there? A. It was impossible from that particular point to see because of the position that I was sitting and the amount of paraphernalia and everything on the shelves at this Von's Market. I mean I couldn't see anything.'

"The Witness: May I see that, please?

"Mr. Lavine: Yes. Were you asked those questions?

"The Court: Objection sustained to the question, it relates to what was taken out of the cash drawer. He has testified here he didn't see what was taken out of the cash drawer.

"The Witness: It says here in the question—

"The Court: Just a minute, please.

"Mr. Lavine: Well, I think it goes a little farther, your Honor.

"The Court: If you ignore the question, yes. Attention was directed to what he saw taken out of the cash drawer. That was his testimony when he said, 'I couldn't see anything.' That naturally means couldn't see anything taken out of the cash drawer."

[10, 11] It should here be noted that the foregoing comments of the trial judge were not objected to by appellant, assigned as misconduct by her, nor was the judge requested to admonish the jurv to disregard them. It has repeatedly been held that where no objection was taken at the time of the occurrence in the trial court it is

too late to urge it as error for the first time on the appeal. People v. Ottey, 5 Cal. 2d 714, 721, 56 P.2d 193; People v. O'Brand, 92 Cal.App.2d 752, 207 P.2d 1083. However, from an examination of the record we perceive no prejudicial error in the conduct of the trial judge. Obviously, his remarks were made in the interests of a proper determination of the case and to that end, it was his right to make comment on the testimony to obviate any confusion in the minds of the jury and to prevent them from being misled. At no time did the trial judge comment upon his belief as to the guilt or innocence of appellant. The latter's criticism is squarely answered by the provisions of Article VI, Section 19 of the Constitution of California People v. Gosden, 6 Cal.2d 14, 28, 29, 56 P.2d 211.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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95 Cal.App.2d 278

LOKE v. LOKE.

No. 14211.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1949.

Hearing Denied Feb. 16, 1950.

Divorce action by Anna Loke against Edward Loke in which the defendant filed a cross-action for divorce.

The Superior Court, City and County of San Francisco, Frank T. Deasy, J., denied plaintiff's motion for counsel fees and costs and she appealed.

The District Court of Appeal, Ward, J., held that if on plaintiff's testimony, trial court was convinced that the motion should be denied, it was not necessary that the defendant introduce any evidence and the denial of the plaintiff's motion was not an abuse of discretion and affirmed the order and judgment.

1. Divorce 🔑188, 223

Allowance of plaintiff's motion for counsel fees and costs in an action for divorce is a matter of judicial discretion. Civ.Code, § 137.

2. Divorce 🔑189, 221

Court, in determining whether plaintiff's motion for counsel fees and costs in action for divorce should be allowed, may consider circumstances of parties and ability of each to pay. Civ.Code, § 137.

3. Divorce 🔑189, 223

Where parties were married only three months before divorce complaint was filed and plaintiff worked before and after marriage and earned approximately $180 per month and testified that she imagined her husband received about $220 a month and that she had recently been called on to assist in the support of a brother in the extent of $40 per month and defendant admitted in his pleadings the receipt of approximately $200 per month but denied that he was able to pay attorney's fees and costs and alleged that parties had community property of the sum of approximately $307 deposited in a bank jointly in the names of plaintiff and himself, denial of plaintiff's motion for counsel fees and costs was not an abuse of discretion. Civ.Code, § 137.

4. Divorce 🔑189, 226

Where on hearing of plaintiff's motion for counsel fees and costs in an action for divorce, plaintiff testified that she did not have sufficient funds for attorney fees and for costs, her credibility was a matter for trial court to determine and if on her testimony trial court was convinced that motion should be denied, it was not necessary that defendant introduce any evidence. Civ. Code, § 137.

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Phil F. Garvey, San Francisco, James A. Himmel, San Francisco, of counsel, attorneys for appellant.

Samuel E. Yee, San Francisco, attorney for respondent.

WARD, Justice.

The question presented on this appeal is whether the trial judge abused his judicial discretion in denying plaintiff's motion for counsel fees and costs in an action for divorce against defendant and discharging the order to show cause why defendant should not pay counsel fees and costs during the pendency of the action.

[1, 2] Plaintiff admits that the allowance of such a motion is a matter of judicial discretion, Civil Code, § 137; Sweeley v. Sweeley, 28 Cal.2d 389, 170 P.2d 469, but submits that the discretion must be based upon facts adduced at the time of the hearing of the motion. The generally accepted method adopted by the court in disposing of such matters where the complaint shows probable cause for institution of an action in divorce is to grant the motion to compel the husband to pay such expenses unless the evidence introduced on the hearing of the motion shows that the wife is in a position financially to compensate counsel and finance the litigation she has instituted. All of the circumstances of the parties and the ability of each to pay may be considered. Whelan v. Whelan, 87 Cal.App.2d 690, 197 P.2d 361; Fallon v. Fallon, 86 Cal.App.2d 872, 195 P.2d 878; Sweeley v. Sweeley, supra.

[3] It is interesting to note that on appeal plaintiff does not claim temporary support and maintenance, as prayed for in the complaint, should have been allowed. If the allegations of the complaint, standing alone, were to be considered independently of the evidence introduced on the hearing of the motion, there might appear to be some foundation for plaintiff's claim of error. However, the record shows that plaintiff and defendant were married only about three months before the complaint was filed. Plaintiff worked before and after marriage and earned approximately $180 per month. Plaintiff testified that she "imagined" her husband received "about Two-Twenty a month," and that recently she had been called upon to assist in the support of a brother to the extent of about $40 per month.

In defendant's answer and cross-complaint he admitted the receipt of "approximately $200 per month" but denied that he was able to pay attorney's fees and costs. The same pleading alleged community property of the sum of approximately $307 deposited in a bank jointly in the names of cross-complainant and cross-defendant.

[4] The record also shows that plaintiff testified she did not have sufficient funds for attorney's fees and for costs; but her credibility on that subject was a matter for the trial court to determine. If upon plaintiff's testimony the trial court was convinced that the motion should be denied, it was not necessary that defendant introduce any evidence.

The order and judgment appealed from are affirmed.

PETERS, P. J. and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

LESSER & SON et al. v. SEYMOUR et al.

Civ. 3889.

District Court of Appeal, Fourth District, California.

Dec. 15, 1949.

Rehearing Denied Jan. 11, 1950.

Hearing Granted Feb. 8, 1950.*

Lesser & Son and others sued Sam Seymour and others for dissolution of a partnership and sale of assets.

The Superior Court for Riverside County, Russell S. Waite, J., ordered partnership assets sold, and defendants appealed.

The District Court of Appeal, Mussell, J., affirmed the order, and held that the court could properly order property sold to a higher bidder to prevent injury to all parties although a previous bid under its previous order for sale had been submitted.

1. Partnership ⇨340

In action for dissolution of partnership and sale of assets, court had power to direct terms of sale by a receiver in the first instance, and power to change terms at a later date, and could by confirming sale, ratify changes, provided terms so ratified were such as court had power to impose in the first instance.

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* Subsequent opinion 218 P.2d 536.

2. Judgment ⚿297

A chancery court has power to supervise execution of its orders and to modify them in ways affecting only the details of their performance, and has such control of its process as prevents it from becoming a source of injury.

3. Receivers ⚿139

In absence of some showing that injury has resulted from a delay in making of a sale of property held by a receiver, sale should not be set aside merely because it was not made before time limit specified in order of court.

4. Partnership ⚿340

Where court appointed receiver to take charge of all partnership assets, and a sale was ordered, but during delay occasioned by protracted hearings on petition for confirmation, a second bid was submitted in excess of that submitted by first bidder, and court found that partnership was being operated at substantial loss, and that final bid was reasonable market value of all assets, and that further loss would be sustained if sale were not made, court could properly order sale to second bidder and include properties which were not mentioned in first order for sale.

5. Partnership ⚿340

In action for dissolution of partnership and sale of assets, court could properly order sale and provide that purchaser should be entitled to credit for payments made by him to the estate and for payments necessary to take care of indebtedness of partnership.

6. Partnership ⚿340, 345

In action for dissolution of partnership and sale of assets, entry of final order of sale nunc pro tunc was not prejudicial error.

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Overton, Lyman, Plumb, Prince & Vermille, Los Angeles, for appellants.

Knight, Gitelson & Ashton, Los Angeles, Thompson & Colegate, Riverside, for respondents.

MUSSELL, Justice.

In this action for dissolution of a partnership and sale of partnership assets, the defendants appeal from an order of sale of receivership assets made at the conclusion of hearings had on a petition by the receiver for confirmation of sale.

Plaintiffs and defendants purchased the property known as "Forbes Farms Nos. 1, 2, 3 and 4", near Thermal in Riverside County, on June 6, 1946. The farms were operated as a partnership by the parties and on October 2, 1947, the plaintiffs filed an action in superior court for the dissolution and termination of the copartnership; for an accounting; for appointment of a receiver; and for a sale of the partnership assets. It was alleged, among other things, that the purchase price of the property was the sum of $616,000.00, of which $177,100.00 was advanced by the plaintiffs; that the balance of the purchase price was covered by a promissory note of the defendants, which note was secured by trust deed and chattel mortgage; that the defendants had been guilty of conduct tending to affect prejudicially the carrying on of the business of the copartnership and various acts of the defendants in that respect are specifically set forth. It is alleged that both plaintiffs and defendants are unskilled in the operation of ranches; that no accounting has been had between the parties and that the appointment of a receiver is necessary to prevent damage and depreciation in value of the property and to prevent waste and irreparable injury to the plaintiffs; that the defendants are not financially responsible and that it is necessary that a receiver be appointed to collect the income of the copartnership and to apply such income to the payment of partnership obligations.

On October 2, 1947, upon motion of the plaintiffs, a receiver was appointed of all of the assets of the partnership. On December 15, 1947, an order for sale of partnership property was issued by Hon. Wm. D. Dehy, Judge assigned. This order was entitled "Order for sale of partnership property within six months from December 2, 1947, or for sale upon the notice and in the manner prescribed by law for the sale of such property under execution". It provided that the receiver sell the Forbes Farms therein described, together with personal property consisting of machinery, equipment, supplies and miscellaneous personal property, partially described in said order. It was provided therein that in the event an offer of purchase was procured prior to the 2nd day of June, 1948, the receiver was ordered to file a petition for confirmation of sale; that in the event an offer was received from any person for the purchase of the property, the offer was to be communicated to the receiver and if it was the highest offer received by him to the date thereof, that he should file a petition for confirmation; that all sales were subject to confirmation of the court and that upon the hearing of any petition for confirmation, any person might raise the offer returned in the petition. Paragraph VII of the order reads as follows: "VII. In the event that the aforedescribed receivership property or any part or portion thereof shall not be sold in the manner as above set forth prior to the 2nd day of June, 1948, the Receiver in the above-entitled cause is now hereby ordered to sell said receivership property or the unsold portion thereof in the manner and upon the notice prescribed by law for the sale of such property under execution. Such sale shall not be final until confirmed by this court upon a petition for confirmation by the Receiver herein."

On or about the 24th day of December, 1947, an offer to purchase was submitted to the receiver by one Anita Short. The offer was in writing and was in the total sum of $450,000.00. On receiving the said offer, the receiver filed a petition for confirmation of sale and an order to show cause was issued thereon returnable before the court on the 5th day of March, 1948. The defendants filed a motion for the continuance of the hearing and also filed objections to the petition of the receiver for the sale of the property. Plaintiffs filed affidavits in opposition to the motion for continuance and filed an answer to the objections filed by the defendants to the petition for confirmation.

The motion for continuance was denied and evidence for and against the petition for confirmation was received by the court at various hearings commencing on the 5th day of March, 1948, and terminating on June 5th of that year. The continuances were necessary by reason of the inability of the parties to complete the taking of testimony.

Pursuant to agreement of counsel, the court set the 25th day of March, 1948, as the time to receive bids for the properties involved and ordered the properties advertized for sale in newspapers of national circulation by notices of sale approved in form by all of the parties to the action, which notices, among other things, provided that bids would be accepted for the property at said time.

On March 25, 1948, at the time noticed, the court asked for bids on the property and the plaintiffs submitted a bid in the sum of $478,301.04, which bid was thereafter during the course of the proceedings amended by the plaintiffs to the sum of $518,065.20, that being the sum bid by the plaintiffs for all of the assets and properties of the receivership estate. The bid of the plaintiffs was the only bid submitted on the 25th of March and the hearing was continued until April 13, 1948. At that time a bid was submitted by a Mr. Wiseman, which bid apparently satisfied the parties who were present in court, the hearing was adjourned and the attorneys proceeded to prepare the necessary papers to effect a disposition of the entire matter. However, the parties were unable to agree upon the terms of the settlement and met again in court on May 3, 1948, and again on May 10, 1948, at which time the hearing on the petition for confirmation was continued without objection to June 2, 1948, and thereafter to June 3rd and June 5th, when the fixed bid submitted by the plaintiffs in the sum of $518,065.20 was accepted by the court and the sale of all of the assets was confirmed to the plaintiffs, Lesser and Son, a copartnership.

Defendants first contend that the court improperly accepted a new bid made on June 5th and improperly confirmed a sale pursuant thereto instead of ordering the receiver to sell the property in the manner and upon the notice as upon execution.

[1-3] This contention is based on the assumption that the court was bound by the order of sale which provided that if the property was not sold prior to the 2nd day of June, 1948, the receiver was required to conduct a sale of the partnership assets in the manner and upon the notice prescribed by law for the sale of such property under execution and the contention is that the order so made having become final, the court was without power to order the sale made on June 5th. In our opinion the point is not well taken. The court undoubtedly had the power to direct the terms of the sale in the first instance but it also had the power to change the terms at a later date, and by confirming the sale, ratify the changes; provided, of course, that the terms so ratified were such as the court had power to impose in the first instance. Bechtel v. Wier, 152 Cal. 443, 445, 93 P. 75, 15 L.R.A.,N.S., 549. As was said in Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 440, 271 P. 363, 366, "The power of a chancery court to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance, has long been recognized." Moreover, the court has at all times such control of its process as to prevent it from becoming a source of injury, and in the absence of some showing that injury has resulted from a delay in making the sale, it should not be set aside merely because it was not made before the time limit specified in the first order. Southern California Lumber Co. v. Ocean Beach Hotel Company, 94 Cal. 217, 224, 29 P. 627, 28 Am.St.Rep. 115.

[4] In the instant action the delay occasioned by the protracted hearings on the petition for confirmation resulted in the submission and acceptance of a bid which was in excess of that submitted by the first bidder, Anita Short. The court found on conflicting evidence that the partnership was being operated at a substantial loss to the parties; that the bid of Lesser and Son, which was finally accepted, was the reasonable market value of all of the assets and properties of the receivership estate and that unless the receivership estate be sold, further loss might be sustained by the receiver in the operation thereof and in the event of and upon the harvesting of the grape crop, the net proceeds which would be derived therefrom would with reasonable certainty be only sufficient to pay liabilities of the receivership estate and of the copartnership and would not provide a fund with which to continue to operate said estate; that the continued operations of said farms and the receivership estate was speculative; that the defendants had not and would not advance any funds for the operation of the receivership estate; that it was, therefore, for the best interests of the creditors of the receivership estate and of the copartnership that said receivership estate be sold; that it was for the best interests of the estate, the copartnership and the creditors that the bid of Lesser and Son for the sum of $518,065.20 be accepted. It would seem, therefore, that the order for the sale was necessary to prevent injury to all of the parties to the action. In fact, the entire record supports the assertion that the parties were all endeavoring to effect a sale by the receiver.

The sale of the partnership assets in the manner and upon the notice prescribed by law for sales under execution was not urged by the defendants during the many hearings had prior to June 5, 1948. The hearings on the receiver's petition for confirmation of sale were commenced long prior to June 2, 1948, a fixed bid of Lesser and Son was made prior thereto and the proceedings commenced upon the petition finally resulted in a definite, fixed and final bid.

The objection is made that the final order of sale included properties which were not mentioned in the first order obtained. However, the receiver was appointed to take charge of all of the assets of the partnership estate and the court was authorized to and did dispose of the entire properties.

[5] Defendants next argue that the final bid was not fixed and certain. As we read the record, the bid was definite and for the entire properties involved. The order of sale provided that Lesser and Son should be entitled to credit for payments made by them to the estate and also payments necessary to take care of indebtedness of the partnership. We find no error in the provisions which were apparently calculated to facilitate the settlement of the partnership affairs, the credits being permissible in lieu of cash. Owen v. Cohen, 19 Cal.2d 147, 153, 119 P.2d 713.

[6] Finally, it is urged by the defendants that the final order of sale was void because it was entered nunc pro tunc as of the 2nd day of June, 1948. In view of what we have here said relative to the power of the court to change orders of sale, we see no prejudicial error in entering such order.

The order is affirmed.

GRIFFIN, Acting P. J., concurs.

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95 Cal.App.2d 338

CANDIDO v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION.

Civ. 14089

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1949.

Gus Candido brought suit against the California Employment Stabilization Commission, successor to the California Employment Commission (formerly Unemployment Reserves Commission), to recover payments of unemployment insurance assessments.

The Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., rendered a judgment for the defendant, and the plaintiff appealed.

The District Court of Appeal, Dooling, J., affirmed the judgment and held that evidence sustained finding that bootblack was an employee of plaintiff rather than a lessee or an independent contractor so as to render plaintiff liable for unemployment insurance assessments.

1. Taxation 🔑111.16

Evidence sustained finding that bootblack was an employee of proprietor of barbershop, so as to render proprietor liable for unemployment insurance assessments under the Unemployment Insurance Act, rather than a lessee or independent contractor. Gen.Laws, Act 8780d, § 9(a).

2. Appeal and error 🔑989, 996, 1012(1)

The weighing of the evidence and the drawing of reasonable inferences therefrom is the function of the trial court, and the duty of an appellate court ends when it determines that there is substantial evidence, or substantial support in the evidence for reasonable inference which supports trial court's findings.

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Fabian D. Brown, San Francisco, attorneys for appellant.

Fred N. Howser, Attorney General of the State of California, Charles W. Johnson, Deputy Attorney General of the State of California, William L. Shaw, Deputy Attorney General of the State of California, attorneys for respondent.

DOOLING, Justice.

Plaintiff, the proprietor of a barber shop, sued to recover payments of unemployment insurance assessments. He appeals from a judgment for defendant.

During the period in question appellant had in his shop three other barbers and a bootblack. Under sec. 9a, California Unemployment Insurance Act, Stats.1937, p. 2055, Gen.Laws, Act 8780d, § 9(a), appellant was only subject to the statute if the three barbers and the bootblack were all employees.

On the trial appellant testified that one of the three barbers, Zingarelli, was a partner in the business and produced documents on their face purporting to be a contract of copartnership between Zingarelli and appellant and a later dissolution of such partnership. Zingarelli contradicted this testimony and testified that he was in fact an employee and that the agreement of copartnership which he signed was a subterfuge, not executed in good faith and never put into operation. The trial court found on this conflicting evidence that Zingarelli was an employee and this finding is not attacked on appeal.

The trial court also found that the bootblack was an employee and the appellant centers his attack on this finding.

As to the bootblack appellant testified that he was a lessee of the bootblack stand at a rental of $8 per month and not an employee. In support of this claim appellant produced a manicurist's contract signed by the bootblack at a period later than that in question and testified that when the bootblack came to the shop originally appellant had an agreement with him "just like it". The bootblack testified that he signed this document without reading it, which may well be believed. The bootblack testified further that he had worked in other barber shops for many years as an employee and that the services rendered by him for appellant were identical with those rendered as an employee in the other shops. His compensation came from shoes shined for customers and from tips. He performed generally the duties of a porter, cleaning the floors, taking care of towels and other equipment, helping customers of the barber shop put on their hats and coats, etc.

On cross-examination the bootblack testified that he had an arrangement with appellant "to pay him $8 a month for the privilege of shining shoes of the customers that came in the barber shop and retained the tips," that he had no fixed hours; paid appellant $2 per week; and that "(we) didn't have that in the agreement, but it was generally agreed between Mr. Candido and myself that I clean up (the shop)."

[1, 2] Appellant claims that this evidence compels a finding that the bootblack was a lessee or independent contractor and not an employee. We cannot agree. It is the function of the trial court to weigh the evidence and draw any reasonable inference therefrom. The duty of an appellate court ends when it determines that there is substantial evidence, or substantial support in the evidence for a reasonable inference, which supports the trial court's findings.

The good faith of appellant was seriously discredited by Zingarelli's testimony that appellant sought to disguise the fact that Zingarelli was his employee by having him sign a fictitious agreement of copartnership. Under the circumstances the trial court was entitled to infer that the arrangement with the bootblack was another subterfuge to disguise what was actually an employer-employee relationship.

The supreme court has held that even though a contract on its face purports to create another relationship, the circumsances may support a finding that the contracting parties are in fact employer and employee. (Pacific Lumber Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 139 P.2d 892; cf. Mark Hopkins, Inc., v. California Employment Stabilization Comm., 86 Cal. App.2d 15, 193 P.2d 792, where this court following Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed.1947, 172 A.L. R. 317, looked behind a written contract designed "to shift tax liability from one taxpayer to another" and found that the writing was a subterfuge to disguise the employer-employee relation between a band leader and his musicians.)

Empire Star Mines Co. v. California Employment Comm., 28 Cal.2d 33, 168 P.2d 686 is not controlling. In that case the trial court found that the contract did not create the relation of employer and employee and the supreme court affirmed this finding; nor was there anything in the evidence in that case to cast doubt on the bona fide character of the written agreement.

Judgment affirmed.

GOODELL, J., concurs.

95 Cal.App.2d 460

FIRST THRIFT OF LOS ANGELES v. PACIFIC INDEMNITY CO.

Civ. 17042.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1949.

The First Thrift of Los Angeles sued Pacific Indemnity Company to recover under bankers' blanket bonds.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., rendered judgment for the defendant, and plaintiff appealed.

The District Court of Appeal, White, P. J., reversed the judgment and held that the bank sustained a loss at time it discounted forged purchasing contracts so that the liability of defendant would be governed by the provisions of bond in effect at that time.

1. Insurance ⚿430

Under bankers' blanket bond which indemnified bank against any loss through payment on faith of any written instrument purporting to have been signed by any customer of insured but which bore forged signature of customer without knowledge or consent of such customer, bank could not recover for payments made to furniture dealer in discounting purchasing contracts forged by dealer.

2. Insurance ⚿430

Where bank discounted purchasing contracts presented and forged by furniture dealer and dealer made some payments thereon, loss to bank occurred at time contracts were discounted and not when default in payments occurred so that liability of surety under bankers' blanket bond would be governed by provisions of bond in effect at time purchasing contracts were discounted.

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Hoag & Mack, A. F. Mack, Jr., Los Angeles, for appellant.

Fulcher & Wynn, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by plaintiff from a judgment of dismissal in favor of defendant, which judgment was entered after the former declined to amend its second amended complaint following the sustaining of a demurrer thereto with leave to amend.

This action was instituted to recover money under bankers' blanket bonds issued by defendant to plaintiff.

Two bonds are involved on this appeal. They will be referred to herein as "first bond," which was effective from July 12, 1945, to January 3, 1947 and "second bond," which was effective on and after January 3, 1947.

By its second amended complaint plaintiff alleged that it is a California corporation, duly licensed to do a finance and personal loan business, which business at all times pertinent hereto included discounting of various types of commercial paper and contracts. The defendant is a California corporation duly licensed to do a multiple line insurance business, and which business included the writing of various surety bonds.

On July 12, 1945, defendant issued to plaintiff the first bond, which was at all times in full force and effect from said date to January 3, 1947. On the last-mentioned date defendant issued to plaintiff the second bond.

The first bond indemnified against loss: "through transferring or paying any money or funds or transferring or delivering any securities or establishing any credit or giving any value on the faith of *forged or altered written instructions or advices from any customer or from any banking institution.*" (Emphasis added.)

The second bond covered any loss: "through transferring, paying, * * * etc. * * * on the faith of any written instructions or advices, directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices *either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution.*" (Emphasis added.)

The second amended complaint further alleged that during the period May, 1946, to March, 1947, one Sidney Weiss, a retail furniture dealer discounted purchasing contracts with plaintiff of the face value of $42,222.79. Payments were made under the contracts to May 14, 1947, leaving a total balance due plaintiff of $24,833.09. That all the contracts were forgeries was discovered May 14, 1947, as well as the fact that all payments up to that date had been made by Weiss himself. Plaintiff's second amended complaint alleged that its total loss was $24,833.09, the amount unpaid on the forged contracts, and that its loss up to January 3, 1947, under the first bond, was $15,803.50. By its second amended complaint plaintiff made claim under both bonds. The limit of defendant's liability under each of the aforesaid bonds was $10,000.

It is the respondent's contention that appellant sustained no loss while the first bond was in force because there was no default in payments upon the forged contracts while said bond was in force, up to January 3, 1947. That no recovery can be had under the second bond because it expressly excludes loss due to forgery with knowledge of the "customer," in this case, Weiss, the forger.

[1] We are in accord with respondent's contention that with reference to the second bond appellant has failed to state a cause of action. In its second amended complaint, appellant has alleged that the documents in question were actually prepared by the customer himself. Manifestly, they can not be said to "bear the forged signature or endorsement or to have been altered *without the knowledge* or consent of such customer" (emphasis added), within the foregoing quoted language contained in and the limited type of forgery covered by said second bond.

[2] Respondent's contention that as to the first bond there can be no recovery because no default occurred in payments to be made under the forged instruments during the term said first bond was in force can not be sustained. While the precise question here presented appears to be one of first instance in California, we are persuaded that the time when appellant's loss occurred was when the money was paid out. While the payments made under the forged documents by Weiss for the purpose of concealing the forgeries from his victim as long as possible reduced the total loss, they do not change the situation that appellant sustained its loss for the reason that its money had been exchanged for something that was worthless because of the forgeries. The loss therefore occurred at the time such exchange was made. And the fact that certain installment payments were made and the forgeries were therefore not discovered until sometime after payment of the money by appellant upon the forged documents does not change the situation insofar as the value of the "contracts" is concerned. They would be worth no more ten years after they were exchanged for appellant's money than they were at the time they were given to appellant. It would therefore seem manifest that appellant's actual loss occurred when its money was paid out. Let us assume that in the instant case Weiss had discounted with appellant one of the forged "contracts" on July 12, 1945 (when the first bond became effective); that such forged "contract" provided that the first payment thereunder was due January 5, 1947 (the first bond having expired January 3, 1947, two days earlier); that Weiss had immediately absconded with the proceeds of his forgery; that appellant had discovered the forgery on August 1, 1945, and immediately sought reimbursement from respondent under the provisions of the first bond. Could it seriously be contended that respondent had no liability under its bond upon the theory that appellant would sustain no loss until the first installment was due January 5, 1947, two days subsequent to the expiration of the term within which the bond was in force? The answer is obvious.

We find support in other jurisdictions for the conclusion reached by us, including the cases of Eliot Sav. Bank v. Aetna Casualty & Surety Co., 310 Mass. 355, 38 N.E. 2d 59, 63; Provident Trust Co. v. National Surety Corporation, 3 cir., 138 F2d 252, 254.

It must therefore be held that while appellant's second amended complaint failed to state a cause of action as to the second bond, it did state a cause of action as to the first bond.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

DORAN and DRAPEAU, JJ., concur.

EDWARD BROWN & SONS v. CITY AND COUNTY OF SAN FRANCISCO.

No. 14022.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1949.

Hearing Granted Feb. 16, 1950.*

Edward Brown & Sons, a corporation, sued the City and County of San Francisco, a municipal corporation, to recover property damage allegedly caused by a defective sewer system operated by the defendant.

The Superior Court in and for the City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment for the defendant, and plaintiff appealed.

The District Court of Appeal, Ward, J., affirmed the judgment and held that failure of the plaintiff to comply with the statutory procedure set up for the enforcement of his claim barred the action although procedure set forth in city ordinance was followed.

Peters, P. J., dissented.

1. Municipal corporations 🔑812(1), 857

Statute requiring any person injured as result of dangerous condition of public streets, highways, building or property to file written verified claim for damages with municipality within 90 days after accident was passed to provide a procedure under which Public Liability Act making municipality generally liable to be sued in tort actions occasioned by dangerous condition of public streets, buildings, grounds or property may be enforced. Gen.Laws, Act 5149, § 1, Act 5619, § 2.

2. Municipal corporations 🔑756, 857

Statute respecting filing of written verified claim for damages with municipality within 90 days after accident was not amendatory of nor limited by Public Liability Act making municipality generally liable to be sued in tort actions for damages occasioned by dangerous condition of public streets, buildings, grounds or property if municipality had knowledge of danger and failed to remedy such condition to protect public therefrom within a reasonable time. Gen.Laws, Act 5149, § 1, Act 5619, § 2.

3. Municipal corporations 🔑723½

Limitation period of 90 days within which claim against city for damages to property resulting from defective conditions of public works must be filed is reasonable. Gen.Laws, Act 5149, § 1.

4. Eminent domain 🔑267

Property owner claiming damages against city allegedly resulting from defective sewer, basing his claim on constitutional right to compensation for property taken or damaged for public use, was required to abide by statutory procedure set up for enforcing right to sue. Gen.Laws, Act 5149, § 1; Const. art. 1, § 14.

5. Municipal corporations 🔑845(1)

Where claimant who sought to recover damages from city and county of San Francisco for damage to property allegedly caused by defective sewer filed claim with comptroller in compliance with provisions of city charter and did not file claim with clerk or secretary of legislative body as required by Public Liability Act, claimant could not recover since compliance with provisions of act was required. Gen.Laws, Act 5149, § 1; Act 5619, § 2.

6. Municipal corporations 🔑741(1)

Board of supervisors of city and county of San Francisco is proper "legislative body" with which claim against municipality for damage resulting from dangerous condition of public works must be filed. Gen.Laws, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Legislative Body".

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* Subsequent opinion 223 P.2d 231.

7. Municipal corporations ⚷827(1)

Enforcement of rights which accrue from damage caused by operation of city of sewer systems is a matter of general state concern governed by general state law.

8. Estoppel ⚷62(4)

Where claimant seeking to recover damages from city caused by alleged defective sewer system filed claim with comptroller in compliance with provisions of city charter and did not file claim with clerk or secretary of legislative body of city as required by statute, city was not estopped from denying liability on ground that statutory procedure for enforcement of claim had not been followed. Gen.Laws, Act 5149, § 1, Act 5619, § 2.

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Arthur B. Dunne, Dunne & Dunne, San Francisco, for appellant.

Dion R. Holm, City Attorney of the City & County of San Francisco, William F. Bourne, Deputy City Attorney of the City and County of San Francisco, for respondent.

WARD, Justice.

This is an appeal from the judgment of the superior court on a directed verdict in favor of the defendant City and County of San Francisco. The action was one for damages arising out of the flooding of a basement office belonging to the plaintiff, Edward Brown & Sons, caused by an allegedly defective sewer.

There are two issues on appeal,—(1) whether the proper procedure was adopted by the plaintiff in filing its claim, and (2) whether there was any evidence to establish a duty in the defendant to repair the sewer in question and therefore a liability for its nonperformance. If the defendant city and county is correct with respect to the first issue relative to filing of the claim, then the question of the duty resting on the defendant to repair the sewer becomes of minor importance.

The plaintiff owns the building at 432 California Street, on the north side of the street between Sansome and Montgomery streets. The basement of the building extends under the sidewalk to a retaining wall at the curb line. The plaintiff conducts a part of its insurance agency business in this basement. The defendant city and county owns and maintains a brick combined storm and sanitary sewer, which is of oval shape approximately 3 feet by 5 feet, extending down the center of California Street, flowing eastward. At the west line of Sansome Street this sewer narrows down to an 18-inch clay pipe by which it connects with a main concrete sewer, 8 feet 6 inches in diameter, flowing north under Sansome Street. The sewers of the east-west streets, such as the one on California Street, generally serve the eastern portion of an area known as Nob Hill and down to the level of the filled-in land portion of lower California Street. In front of the plaintiff's premises in the area mentioned a concrete side sewer entered the California Street sewer, about 1 foot above the bottom thereof, and extended to the curb line and retaining wall where it was connected by a trap to the cast iron pipe plumbing system of the building.

From approximately September, 1940, through January, 1941, the plaintiff had trouble with seepage of water into its basement. The city water department was called, which made an investigation and reported that the difficulty could not be attributable to the water system. The superintendent of sewer repair for the City and County of San Francisco testified that in order to ascertain the source of the trouble he put red dye and water into the trap of the side sewer and that it did not seep into the basement, though other water did. About 11 days later green dye and water were put into leader pipes on the roof and the dyed water did seep into the basement through cracks in the floor and around the plumbing fixtures. On January 21, 1941, a heavy rain coincided with a high tide. The elevation of the California Street sewer at the point in front of the plaintiff's property is lower than the top of high tide as indicated for that date. The plaintiff's basement became flooded to a depth of about 28 inches. A plumber testified that he arrived at the premises shortly after

5:00 p. m. that day, found the floor of the basement bucked up and evidence of disintegration in the concrete side sewer just outside the retaining wall. He made repairs by "drifting" a new cast iron pipe through the existing side sewer leading to the main sewer and connected it at the street side of the building trap. The city sealed it at the other end connecting it to the main sewer.

On March 19, 1941, 57 days after the date of the flood damage, the plaintiff presented a claim in the amount of $7,000 to the city controller. (See § 87, San Francisco Charter.) The receipt of this claim was acknowledged by the controller the following day. No objection was made by the defendant as to the place of presentation and filing of the claim. By letter of April 4, 1941, from the city attorney's office, the plaintiff's claim was rejected on the merits, stating that the break being in the side sewer within the sub-sidewalk area the responsibility therefore must be assumed by the property owner. The plaintiff brought action against the City and County of San Francisco, and from March 17 to 19, 1948, it was tried before a jury on the amended complaint. At the close of the plaintiff's case the defendant made a motion for nonsuit, which was denied. After final argument to the jury the defendant moved for a directed verdict, which was granted, judgment being rendered on March 19, 1948, in favor of the defendant.

The motion for directed verdict was granted on the basis of noncompliance by the plaintiff with the claim statute of 1931, Deering's Gen.Laws, Stats. 1931, Act 5149, § 1, p. 2562, which requires: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building park, grounds, works or property, * * * a verified claim for damages shall be presented in writing and filed with * * * the clerk or secretary of the legislative body [board of supervisors here] of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." The plaintiff had complied with this statute in all respects except that it filed its claim at the wrong place, with the controller rather than with the board of supervisors. The plaintiff was following the procedure set forth in section 87 of the San Francisco Charter providing for such claims, which is as follows: "All claims for damages against the city and county must be presented to the controller within sixty days after the occurrence from which it is claimed the damages have arisen. Such claims must be verified by the oath of the claimant and must contain the name and address of the claimant, the date and place of the occurrence or injury from which damages are claimed, the nature and amount of said injuries or damages and the items making up said amount; otherwise there shall be no recovery on any such claim or by reason of the said occurrence for which damages are claimed."

[1-3] The claim statute of 1931 is generally regarded as having been passed to provide a procedure under which the Public Liability Act of 1923 might be enforced. Deering's Gen.Laws, 1937, Act 5619, § 2, p. 2630. The Act of 1923 makes a county, municipality or school district generally liable to be sued in tort action for damages to persons and property occasioned by the dangerous or defective condition of its public streets, buildings, grounds, works and property, when its governing or managing board, officer or person having authority to remedy the condition had knowledge or notice of the defective or dangerous condition and failed within a reasonable time to remedy it or to protect the public against it. Without the Public Liability Act of 1923 a municipality, for instance, would be liable only for damages arising from the use of an instrumentality in the performance of some proprietary enterprise, but it has been held that since that act was passed such municipality would be liable whether the damage arose from a proprietary or governmental instrumentality. With respect to the 1931 statute providing for procedure, it was stated by

the court in Helbach v. City of Long Beach, 50 Cal.App.2d 242 at pages 244-245, 123 P.2d 62 at pages 64: "That act is not amendatory of, dependent upon, or limited by, the Public Liability Act of 1923, supra * * *; it purports to declare the limitation applicable 'whenever' any person claims damages against a municipality arising out of the defective condition of 'any' public street, highway, building, etc. To uphold respondent's position we should, in effect, have to write into that law words of limitation and exception making it read, 'Only when it is claimed that any person has been injured * * * as a result of the dangerous or defective condition of any public street, highway, building, * * * or property not owned or operated or maintained in a proprietary capacity, a verified claim for damages shall be presented,' etc. We perceive no justification and have no authority for such judicial legislation. We must accept and apply the law as the legislature has written it." See, also, Eastlick v. Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225; Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931. The Helbach case was an action for damages for personal injuries resulting from a fall down an exterior stairway of a building operated by the defendant city in which a judgment for the plaintiff was reversed on the ground that she had not filed her claim within the 90-day period provided by the 1931 state statute, though she had filed within the 6-month period provided by the city charter. The case also holds that the 90-day limitation period was prescribed for claims even though they were based on common law liability, and that such provision must be complied with as long as it was a reasonable requirement. Ninety days is deemed reasonable as to time for filing. Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102.

[4-6] Though the plaintiff on appeal bases its claim on article 1, section 14, of the state Constitution, it must abide by the procedure set up by the Legislature for enforcing the right to sue. In Young v. County of Ventura, supra, the plaintiff was denied recovery for damage to his land caused by flood waters from a drainage ditch maintained by the county because he failed to file pursuant to the 1931 statute. The court there said, 39 Cal.App.2d at page 737, 104 P.2d at page 105: "The constitution declares the right but does not provide the procedure by which the right may be enforced, and the legislature acted within its province in establishing the procedure necessary for the enforcement of the right. * * * By failing to comply with the procedure established by the legislature plaintiffs are deemed to have waived their right to enforce payment. [Citing cases.]" In Knight v. City of Los Angeles, 26, Cal.2d 764, 164 P.2d 779, it was held that substantial compliance with a claim provision, irrespective of whether based upon statute or charter, is sufficient. The ruling in that case, however, does not apply here. In that case the court was interested in the sufficiency of the specification of time for filing and not with respect to a failure to present a claim to the designated statutory body. In this instance, the proper legislative body, Stats.1931, p. 2475, is the board of supervisors, which is the only body possessing authority to allow the claim. Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759. In Douglass v. City of Los Angeles, 5 Cal.2d 123, at page 133, 53 P.2d 353, 357, the court stated: "The theory of the law requiring the filing of a claim before suit contemplates that if the claim be just and proper the municipal officer or body with which the claim is filed shall have power to approve payment without suit and make such approved claim a valid claim against the city without the necessity of the claimant reducing the demand to judgment. If the board has no such authority the filing of a claim with it would be futile and would thus fail to bring notice of the claim to the municipal authority having power to order the claim paid, without suit." The Douglass case is noted with approval in the Knight case.

[7] The plaintiff contends that the maintenance of sewer systems within a city is purely a local affair, citing many cases, and that therefore the means of recovery for damage from such operations are local problems. A distinction is drawn

between the operation of such facilities, which may be local, and the enforcement of rights which accrue from damage caused by such operation. The latter is a matter of general state concern, governed by general state law. "In Department of Water & Power [of City of Los Angeles] v. Inyo Chemical Co., 1940, 16 Cal.2d 744, at page 753, 108 P.2d 410, at page 416, the Supreme Court reiterated that rule, declaring 'It is undisputed that the matter of the liability of and payment by a city for its tort is not a municipal affair.' The reasons for applying this rule to cities in proprietary enterprises are fully as cogent as when they are engaged in exclusively governmental activities." Helbach v. City of Long Beach, supra, 50 Cal.App.2d at pages 246–247, 123 P.2d at page 65. The plaintiff claims that this rule should be and is limited to situations where the general public is affected by the way the city performs the activity in question, such as the maintaining of streets, sidewalks and public buildings, rather than be applied to this situation which involves a sewer line extending only to a private building occupied by the plaintiff. The maintenance of a sewer does not affect the public generally, even though it runs only to a private building. Concern for the public health, so far as it may be affected by sewer pipes built under streets or highways, is not limited to a single area in a large city, though there may be interlocking pipes running into a private building; it extends not only to the employees in that building but also to the general public because of the possible spread of disease. "Since the Legislature has power to make regulations covering matters of state concern, as it did in enacting the Public Liability Act of 1923, it also has power to regulate the manner in which the rights given by said act may be enforced." Eastlick v. City of Los Angeles, supra, 29 Cal.2d at page 666, 177 P.2d at page 562, 170 A.L.R. 225. A charter provision may not operate to change the rule if the health problem is of statewide rather than local concern.

[8] The last point raised by the plaintiff on this appeal is that of estoppel. In Powers Farms, Inc., v. Consolidated Irrigation District, 19 Cal.2d 123, at page 130, 119 P.2d 717, at page 722, the court said: "It is well settled that written notice to or actual knowledge on the part of public officers does not constitute a substantial compliance with or satisfaction of a statutory requirement for a verified claim, or give rise to an estoppel to assert the defense. The long-established rule in this state is that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction. Compliance with this statute is mandatory and the requirement may not be waived. [Citing numerous cases.]" To the same effect is Bradshaw v. Glenn-Colusa Irr. Dist., 87 Cal.App.2d 882, 883, 198 P.2d 106; also, Ghiozzi v. City of South San Francisco, 72 Cal.App.2d 472, 476, 164 P.2d 902; Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, cited by plaintiff, may be distinguished. There the plaintiff won in an action based on the 1923 statute in spite of not having filed her claim within the 90-day period prescribed by the claim statute of 1931. The defendants were estopped to complain, having obtained a complete statement from plaintiff, who had relied on their advice not to employ counsel and to wait until she knew the extent of her injuries before filing a claim.

Since the procedure provided for by the 1931 claim statute, compliance with which was a condition precedent to a recovery, was not followed it is unnecessary to decide the question whether the plaintiff was entitled to damages on the merits.

There should be no hesitancy with respect to reaching the foregoing conclusion. I cannot approve a statement that the voters of the City and County of San Francisco by a charter provision or through a city official, or the charter itself misrepresented the facts or the law to the plaintiff, or that by the charter or statutory provisions the voters or the members of the Legislature misled the plaintiff into a trap for the unwary.

The judgment is affirmed.

BRAY, Justice (concurring).

I concur, although reluctantly, because I feel bound by the decisions heretofore written by the Supreme and Appellate Courts. If any relief is to be granted from the rigid and technical rules now prevailing as to the filing of claims for damages against governmental agencies, such relief must come either from the Legislature or the Supreme Court. An intermediate court, except on matters involving federal constitutional questions, is bound by the decisions of the Supreme Court. I agree with the dissenting opinion that the theory of the Farrell case should be broadened to meet a situation such as here, where the claimant is barred by a technicality from having his day in court. I cannot, however, go along with that opinion in holding that the mere amendment of a charter provision referring to "all claims"—(there are claims, such as contract claims, which do not come within the statutory provision)—constitutes "a trap."

PETERS, Presiding Justice.

I dissent.

The present case dramatically illustrates the injustice and unfairness of the existing rules on the subject of filing claims against governmental agencies. The plaintiff has a claim against the city for serious damage to its property caused by the claimed negligence of the city in the maintenance of its sewage system. This claim is not based on the Public Liability Act of 1923. It is not merely a statutory right, but is one based upon and created by the Constitution itself. Art. 1, § 14 of the Constitution. The plaintiff's counsel carefully followed the procedure outlined in the City Charter—§ 87 as amended in 1935. He filed the claim on the 57th day after the injury, and presented the same to the controller, as required by that section. The controller turned the claim over to the city attorney, who denied it well within the 90-day period required by the state statute, the claims act of 1931. This denial was on the merits, and not on the ground that the wrong person had been served. Then, after the 90 days, plaintiff is told that it cannot recover, not because the city was not negligent, not because the city is not liable, but solely because his counsel served the wrong city employee. There is no claim that the city was actually prejudiced by the claim being filed with the wrong officer—in fact, whether the claim was filed with the controller or clerk of the board of supervisors, it would have been referred to the city attorney—the very man to whom it was referred.

The claim statute, first passed in 1931, Stats. of 1931, Chap. 1168, p. 2476, and now contained in the Government Code, provides, in § 1981 of that code, that the claim "shall be presented in writing and filed with * * * the clerk or secretary of the legislative body of the school district, county, or municipality". Section 1982 provides for what the claim must contain, while § 2001 requires the city attorney to defend actions of this character brought against municipalities. The city charter—§ 87—requires that "All claims for damages against the city and county must be presented to the controller." The city attorney, under the act of 1931, has to approve any compromise of such a claim Deering's Gen.Laws, Act 5149, § 4.

Prior to 1944, the cases had established the law to be that the state statute prevailed over city charter provisions, and had to be strictly complied with, not only as to the time limits and contents of the claim, but also as to the person upon whom service had to be made. Prior to that year, it had many times held that the city could not waive compliance with the claims statute, nor could it be estopped from pleading noncompliance with the statute, regardless of the harshness of the result. In 1944, the Supreme Court reappraised its former opinions, and in the well-reasoned case of Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, held, in accordance with fundamental rules of fair play, that where representatives of the county had made representations to the plaintiff that induced her not to consult a lawyer and not to file a claim until after 90 days, the county was estopped from relying on noncompliance with the statute. That case has been followed in various factual situations. Tyra v. Board of Police, etc., Com'rs., 32 Cal.2d 666, 197 P.2d 710; County of Sacramento v. City of Sacramento, 75 Cal.App.2d 436, 171 P.2d 477; Benner v. Industrial Acc. Comm. 26 Cal.2d 346, 159 P.2d 24; Katz v. A. J. Ruhlman & Co., 69 Cal.App.2d 541, 159 P.2d 426. In Schulstad v. City and County of S. F., 74 Cal.App.2d 105, 168 P.2d 68, the rule of the Farrell case was applied to a situation where the claim was not filed within 90 days because the accident in which plaintiff was injured as a result of the negligence of the city had rendered the plaintiff mentally incapacitated for over 90 days. Related to these cases are those that hold that the "substantial" rather than "strict" compliance is all that is required. Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779; Perry v. City of San Diego, 80 Cal.App.2d 166, 181 P.2d 98.

The importance of these cases is that they establish the principles that the city, in a proper case, may be estopped from relying upon the defense of noncompliance with the statute, and that substantial compliance is all that is required. The old doctrine of strict and literal compliance with its attendant harsh and unfair results, has disappeared from the law.

The principles of these cases apply to the factual situation here involved. Let us look at the situation realistically. If the city attorney, or other representative of the city, had represented to the plaintiff that the claim should be filed with the controller, and the plaintiff, in reliance on such representation, had so filed the claim, there would be no doubt at all that an estoppel would exist. That is the precise rule of the Farrell case. Here the city has spoken and has misled the plaintiff. It has spoken in the most solemn and formal way a city may speak—by its charter. The charter provision unequivocally misstates the law and thus constitutes a trap for the unwary—a trap well designed to ensnare even the most experienced counsel, as this case well illustrates. It is worthy of mention that § 87 was amended in 1935, after the state claim statute had been passed in 1931. Thus, the city, with full knowledge of the 1931 statute, and with full knowledge that its charter provision contained a positive misstatement of the law, nevertheless deliberately retained the provision, and in fact amended it and the state legislature approved the amendment, after 1931. Certainly, if a misrepresentation by a city official creates an estoppel, a misrepresentation by the city itself in its basic charter should have the same effect. In the instant case, the city by this defense is seeking to gain an advantage over the plaintiff by claiming that the plaintiff acted improperly in doing exactly what the city told him to do. Such a defense should not be countenanced by a court of justice. Government should act in such a way as to be an example to its citizens, and by that I mean a good example and not a bad one. Here, in addition to the positive and direct misrepresentation in the charter, the city attorney, well within the 90 days, denied the claim, but in doing so did not elect to take advantage of the procedural defect, but denied the claim on its merits. While the city attorney was not under a duty to inform the plaintiff of the procedural defect, when he did speak without reference to the procedural defect he impliedly represented that the proper procedure had been followed, and, in my opinion, waived the defect.

I am aware that there are cases holding that the claim must be filed at the place designated in the state statute and not in the city charter, and that such rule will be strictly enforced no matter how harsh such result may be. Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759,—an opinion which I signed; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580. But these cases decided prior to the decision in the Farrell case and must be held to have been qualified thereby. It is also true that the precise point has recently been decided by a District Court of Appeal adversely to the position taken in this dissent—Ansell v. City of San Diego, Cal.App., 209 P.2d 618,—but it is also true that the Supreme Court has granted a hearing in that case. It should be mentioned that the appellate court did not discuss the theory here advanced. It is to be hoped that the

Supreme Court, in the Ansell case, will reverse the cases above cited and announce a common sense fair rule of law that will lay at rest once and for all the cases that have placed pure formalism above substance.

95 Cal.App.2d 269

WALKER et al. v. JENSEN.

Civ. 7683.

District Court of Appeal, Third District, California.

Dec. 21, 1949.

Hearing Denied Feb. 16, 1950.

Action by Mrs. Gladys Walker and her husband against Gus Jensen for malicious prosecution.

The Superior Court, Humboldt County, Delos A. Mace, J., entered judgment for the plaintiffs, and the defendant appealed.

The District Court of Appeal, Thompson, J., held that the jury was fully and fairly instructed on all of the essential issues of the case, and affirmed the judgment.

1. Malicious prosecution 🔑71(3, 4)

Where in action for malicious prosecution there is a conflict of evidence as to whether the defendant in good faith made a full and fair statement of all material facts to his attorney, questions as to the good faith of the defendant and of the presence or absence of malice should be submitted to the jury under proper instructions.

2. Malicious prosecution 🔑21(2)

Where the advice of counsel is not sought in good faith, it affords no defense to a suit for malicious prosecution, particularly where material facts have been omitted from the statement made to counsel.

3. Appeal and error 🔑1002

Where, in action for malicious prosecution, there was a conflict of evidence as to whether defendant acted in good faith in accepting advice of his attorneys or in prosecuting criminal charge against plaintiffs District Court of Appeal was not at liberty to set aside verdict or judgment for plaintiffs.

4. Malicious prosecution 🔑56

In a suit for malicious prosecution, burden is on plaintiff to show that defendant prosecuted criminal charge maliciously and without probable cause or that he was not in good faith in so doing.

5. Malicious prosecution 🔑55

The defense of reliance on the advice of counsel may be shown under a general denial in the complaint in a malicious prosecution action.

6. Appeal and error 🔑1056(1)

In action for malicious prosecution, after defendant signed complaint charging plaintiffs with disturbing the peace, where defendant's testimony as to what disclosures he had made to his attorney and what attorney responded was excluded, and question was withdrawn and no offer of proof made, but no similar question was asked of defendant with relation to what he told district attorney and record contained no evidence or offer to prove what facts defendant stated to district attorney, error was harmless error.

7. Malicious prosecution 🔑59(10)

In action for malicious prosecution, testimony as to what disclosure defendant made to his attorney and what attorney responded was competent to show defendant's reliance on advice of counsel.

8. Malicious prosecution 🔑72(2)

In action for malicious prosecution, omission from instruction that probable cause could be based on a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge was true was not error.

9. Malicious prosecution 🔑72(2, 4)

In action for malicious prosecution, instructions that if defendant, when he instituted prosecution, honestly believed that plaintiffs were guilty of an offense against law of state, and that his belief was founded on the knowledge of circumstances tending to show such guilt and was sufficient to induce in the mind of an ordinary prudent and reasonable man the belief of such guilt, and such belief negatived the idea of want of probable cause, and that probable cause depended on the honest and reasonable belief of the party prosecuting, and that good faith and lack of malice constituted a complete defense to a suit for malicious prosecution, were not erroneous.

10. Appeal and error ⚿882(12)

The appellant may not predicate error on alleged erroneous or prejudicial instructions which were offered at his own request.

◆

E. S. Mitchell, Eureka, for appellant.

Chester Monette, Eureka, Francis B. Mathews, Eureka, for respondents.

THOMPSON, Justice.

The defendant has appealed from a judgment of $500 and a similar amount as punitive damages, which was rendered against him in a suit for malicious prosecution. After consultation with his own lawyer and the district attorney of Humbolt County, the defendant filed a criminal complaint in the Police Court of Eureka against Gladys Walker, under Section 415 of the Penal Code, charging her with disturbing the peace. Mrs. Walker was found to be not guilty. The action for malicious prosecution was then commenced. The answer consisted of a general denial of the allegations of the complaint. A jury returned a verdict against the defendant upon a conflict of evidence. A motion for judgment notwithstanding the verdict was denied. Judgment was rendered accordingly. From that judgment this appeal was perfected.

The appellant contends the verdict and judgment are not supported by the evidence; that reliance upon the advice of counsel was a complete defense to the institution of the criminal action; that the trial judge erred in excluding evidence at the trial, and in omitting from an instruction given to the jury the definition of probable cause. The phrase "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true" was omitted. In support of that contention the appellant relies on Morris v. Moore, 61 Cal.App. 314, 316, 214 P. 995; Green v. Stewart, 106 Cal.App. 518, 526, 289 P. 940; Fackrell v. McDonald, 87 Cal.App. 418, 425, 262 P. 431.

The plaintiffs, Mr. and Mrs. Walker, have operated a restaurant on Broadway, in Eureka, called the "Wagon Diner" for a period of three years. They have four children ranging in age from eight to seventeen years. For the past year and a half the defendant has conducted a motel court on a road adjacent to plaintiffs' property and in the rear thereof. Dissensions arose between the respective parties. There is evidence of existing enmity between them. Mrs. Walker admitted calling the defendant "a dirty s—— of a b——." The defendant complained of plaintiffs' children annoying his customers and injuring his business. He made several complaints to various city officers. He complained of disturbances created by the children, and of the sanitary conditions of plaintiffs' property. Some investigations were made on several occasions, but no action was taken against them.

November 1, 1947, following Halloween night, the defendant, after consulting his own attorney and upon advice of the District Attorney filed, under Section 415 of the Penal Code, a criminal action in the Police Court of Eureka against plaintiff Gladys Walker for disturbing the peace. After trial before the Police Judge, the defendant was found not guilty. This suit for malicious prosecution of that criminal case was then commenced. The appellant is mistaken in assuming that the evidence of the alleged disturbance of the peace was confined to plaintiffs' children. There is direct and positive proof that Mrs. Walker was present and participated in the disturbance. It is true that defendant had previously complained to the police officers of disturbances on the part of the children as well as of Mrs. Walker. It is also true that the officers had previously warned Mrs. Walker and the children against such disturbances. Mr. Jensen testified that on October 31st, about 6:30 P.M., when the demand for motor court accommodations was usually active, and while he was showing a prospective renter his apartments, seven or eight children assembled on the sidewalk adjacent to the entrance of his property and engaged in "loud, hostile and vicious" language, which disturbed the peace and injured his business; that he notified the police officers, and that three of the officers visited the premises, and one of the officers then warned the children and Mrs. Walker.

With respect to Mrs. Walker's presence at the time of the disturbance, the defendant testified that she was present talking to the children, "She stood at the same spot." He said that two of the Walker girls had warned him of "What was going to happen Halloween;" that on Halloween night "after the police left, and after the police had given their second warning in two nights," Mrs. Walker approached the defendant and addressed him in a loud, boisterous and offensive manner. He testified she "called me names and shouted", so it could be heard "all over the back of the property, in the guest rooms and in our own apartment upstairs," saying, "I was a dirty old goat, * * * the meanest snake in Eureka," and that "I was crazy and should be in an insane asylum." He was asked if those statements were made in a conversational tone of voice, and he replied, "Loud, loud, hostile, vicious." In reply to an inquiry, he said the accusations could be heard within thirty-five or forty feet. In fact, Mrs. Jensen and a motel guest by the name of Mrs. Cobbs came out to see what the disturbance was about.

It appears in this action for malicious prosecution that before the defendant filed a complaint against Mrs. Walker in the Police Court, he first consulted with his attorney, Mr. Milton Huber, who advised him that he had a good cause of action for disturbing the peace, and suggested consulting the District Attorney of Humbolt County. The defendant, accompanied by two of his guests, Mr. and Mrs. Cobbs, consulted the District Attorney. That officer examined them in detail regarding the alleged disturbance of the peace which occurred the previous evening. At the trial of the action for malicious prosecution, the defendant testified that he stated to the District Attorney "all that happened," in exact accordance with his testimony given in the malicious prosecution trial. He said he told the attorney of the prior complaints and discussions with the Walkers. When he was asked, "You have testified to nothing here today which was not revealed to your attorney on those occasions, Mr. Jensen?", he replied, "That's correct." After the complainant and his guests were examined, the defendant asked the attorney "whether or not something could be done about it?" and the attorney advised him that there were "sufficient grounds with which to file a disturbing of the peace complaint." The District Attorney, after fully examining the complainants, called in his stenographer and dictated the complaint in the identical form in which it was filed. It charged Mrs. Walker with disturbing the peace by wilfully, unlawfully and maliciously "making loud and unusual noises, by tumultuous and offensive conduct and by the use of rude and opprobrious names." The District Attorney handed the complaint to the defendant with instructions to swear to it and file it in the Police Court, which he did. The District Attorney prosecuted that criminal action. It was tried before the Police Judge, and Mrs. Walker was acquitted.

Neither the defendant's attorney, Milton Huber, nor the District Attorney, was called or sworn in in the suit for malicious prosecution to ascertain what facts the defendant related to them. Mr. Huber represented the defendant in the last-mentioned case, and was present in the courtroom during the trial. It appears to be an important omission from the statements made to counsel that on numerous occasions the defendant had complained to various city officers of the disturbances by the Walker family and of sanitary conditions of their premises, and that, upon investigations, the officers invariably failed to take action. The defendant failed to show that he made any such statement to the attorneys. It would appear that a full and fair statement of material facts would require the disclosure to the attorneys of those numerous alleged disturbances of defendant's peace and the officers' refusal to take action. In fact, several officers testified at the trial of the malicious prosecution action that numerous complaints were made by the defendant, and several investigations followed, but that they failed to find evidence of any violation of the law. The officers gave the impression that they considered the complaints to be trivial and without merit. If the attorneys had been informed of those fruitless investigations of prior complaints, they might have concluded that the defendant was not in good faith, or that he might have been inspired by animosity or malice, or that there was not probable cause to believe that Mrs. Walker was guilty of disturbing the peace.

[1] When there is a conflict of evidence, as there appears to be in the present case, as to whether the defendant, in good faith, made a full and fair statement of all material facts to his attorney, the questions of the good faith of the defendant and of the presence or absence of malice should be submitted to the jury under proper instructions. Green v. Stewart, supra; Moore v. Durrer, 127 Cal.App. 759, 768, 16 P.2d 676. In this case we must assume the jury found against the defendant on both of those issues.

[2, 3] It is true that numerous authorities in California and elsewhere support the rule that in defense of an action of malicious prosecution, where the defendant solicits the advice of an attorney, and makes a full and fair statement of all material facts with respect to an alleged criminal charge, and, *in good faith,* accepts the advice of counsel that he has a meritorious cause, it must be presumed he has "made out a complete defense to the action." 16 Cal.Jur. 741, sec. 11. It has been frequently said that showing refutes the contention that the defendant, in the malicious prosecution action, lacked probable cause for instituting the criminal action, and also disproves the charge of malice, which is a necessary prerequisite to liability in a malicious prosecution action. The rule is peculiarly applicable when the advice of a regularly elected prosecuting officer of a state or county is sought and relied upon, since it is his official duty to enforce the criminal statutes in the interest of public welfare. 34 Am.Jur. 748, sec. 72. It is, however, true that the advice of counsel must be sought *in good faith* and not as a mere cloak to protect one against a suit for malicious prosecution or to refute the theory of malice. 54 C.J.S., Malicious Prosecution, § 51, p. 1017. It follows that when the advice of counsel is not sought in good faith, it affords no defense to a suit for malicious prosecution, particularly when material facts have been omitted from the statement made to counsel. The jury was fully and fairly instructed in this case upon the issues of good faith, malice, probable cause for prosecuting the criminal case, and reliance on the advice of counsel, as defenses. We must assume the jury determined that the defendant was not in good faith in accepting the advice of his attorneys, or in prosecuting the criminal charge of disturbing the peace against Mrs. Walker. Since there is a conflict of evidence upon those issues, we are not at liberty to set aside the verdict or judgment on those grounds.

[4-6] In a suit for malicious prosecution the burden is on the plaintiff to prove that the defendant prosecuted the criminal charge maliciously and without probable cause, or that he was not in good faith in so doing. It has been held that the defense of reliance upon the advice of counsel may be shown under a general denial of the complaint. Levy v. Brannan, 39 Cal. 485; Richter v. Neilson, 11 Cal.App. 2d 503, 508, 54 P.2d 54; Baker v. Gawthorne, 82 Cal.App.2d 496, 498, 186 P.2d 981; Stephens v. Conley, 48 Mont. 352, 138 P. 189, 193, Ann.Cas.1915D, 958; 16 Cal.Jur., sec. 13, p. 744, at 746; 34 Am. Jur., sec. 118, p. 773.

[7] The appellant asserts that the court erred in sustaining plaintiffs' objection to the question, "Will you state what you said and what your attorney responded." We may assume that question was intended to elicit from the defendant what he stated to his attorney to show that he made a full and fair statement of all material facts. It was competent evidence. The court inadvertently sustained the objection. The judge said, "If he testifies that he made a disclosure to his attorney, I don't think you have to go into the various phases of that disclosure." Defendant's attorney

thereupon withdrew the question. Defendant's attorney did not renew that question, nor thereafter offer or seek to prove what the defendant said to his attorney, except to ask him if he told the attorney all that he had testified to at this trial, which he had. But he did not testify that upon his numerous complaints to the public officers they had investigated the charges and refused to take action because they found no violation of the law. Moreover, the preceding question related only to what the defendant related to his attorney Milton Huber. No similar question was asked with relation to what he told the District Attorney. The record contains no evidence or offer to prove what facts the defendant stated to the District Attorney. We think the defendant may not complain, under the circumstances of this case, of having been deprived of showing just what he related to his attorneys.

[8, 9] The defendant charges the court with erroneously instructing the jury with respect to the term "probable cause". It is contended the definition should have informed the jury that probable cause may be based upon "a *suspicion* founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Morris v. Moore, 61 Cal.App. 314, 214 P. 995, 996. We are convinced the court did not err in omitting from the challenged instruction the foregoing quoted language. It will be observed that the "suspicion" which may warrant one in assuming there is probable cause of guilt, *must be "founded upon circumstances sufficiently strong to warrant a reasonable man" to believe the accused is guilty.* It is the existing circumstances, after all, which must determine the question of probable cause, and not a mere suspicion. A mere suspicion may be founded on fallacy and not facts, or even upon rumor. Funk & Wagnalls New College Standard Dictionary defines "suspicion" as, "Conjecture; doubt; mistrust; imagining something wrong without proof or clear evidence." The word "suspicion", as it is used in the Morris case, supra, is clearly modified by the language which follows it. It is sufficient only when it is founded on facts or circumstances which would warrant a reasonable person in believing the accused had violated the law. The instructions which were given to the jury on that subject definitely and repeatedly charged the jury to the same effect. We are convinced the jury could not have been misled by the omission of the word "suspicion". The instruction, in our opinion, was not erroneous. Certainly it was not reversible error. The jury was elsewhere charged that: "If you believe from the evidence that the defendant, when he instituted the prosecution complained of, honestly believed that the plaintiffs were guilty of an offense against the law of this state *and that his belief was founded on a knowledge of circumstances tending to show such guilt and would sufficiently induce in the mind of an ordinarily prudent and reasonable man the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.*" (Italics added.)

In the following instruction the jury was charged: "I instruct the jury that *probable cause does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting*; and the question of whether there was a probable cause must be determined from the facts as they existed and appeared to the party prosecuting at the time he brought the action." (Italics added.)

Likewise the next instruction charged the jury as follows: "I instruct the jury that good faith and lack of malice constitute a complete defense to a suit for malicious prosecution. No matter what may have prompted the suit upon which the action for malicious prosecution is based, no matter how causelessly such action was commenced, and *no matter how badly mistaken the defendant may have been in believing that he was justified in bringing the action, if he did really act in good faith and without malice in bringing the action he cannot be made liable for malicious prosecution.*" (Italics added.)

The jury was fully and fairly instructed on all the essential issues of this case.

We find no prejudicial error in the charge to the jury.

[10] Moreover, the transcript on appeal fails to show which party offered the challenged instructions. Upon motion of plaintiffs under Rule 12 of Rules on Appeal, augmentation of the record was granted, from which it appears that the instructions complained of in Point Ten of appellant's opening brief where in fact offered by the defendant.

It is the established rule that appellant may not predicate error on alleged erroneous or prejudicial instructions which were offered at his own request. Murray v. Kunde, 91 Cal.App. 440, 445, 267 P. 158. And as the Supreme Court said in Deevy v. Tassi, 21 Cal.2d 109, 124, 130 P.2d 389, 398: "* * * In any event, even if it were held that the instructions complained of were erroneously given, that error would not be available to defendants, as on the record we must presume that such instructions were given at defendants' request. [Citing authorities.]"

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

JACKSON v. UNIVERSAL INTERNATIONAL PICTURES, Inc. et al.

Civ. 16855.

District Court of Appeal, Second District, Division 3, California.

Dec. 15, 1949.

Rehearing Denied Jan. 9, 1950.

Hearing Granted Feb. 8, 1950.*

Action by Frederick Jackson against Universal International Pictures, Inc. and others for damages for alleged appropriation of the stage play title, "Slightly Scandalous", as a title of a motion picture.

From a judgment of the Superior Court of Los Angeles County, Henry M. Willis, J., in favor of the plaintiff, the defendants Universal Pictures Company and Universal Film Exchanges, appealed.

The District Court of Appeal, Vallée, J., reversed on the ground that the evidence was insufficient to warrant implied findings that the title had acquired and retained a secondary meaning in relation to the plaintiff's play, so as to entitle him to exclusive use thereof.

1. Trade-marks and trade-names, and unfair competition 🔑71

An author has no right in mere title of play and to warrant award of damages for alleged appropriation of title there must be priority of adoption, the title must have been so used as to have acquired a secondary meaning which identifies it in public mind with the play, and there must be retention of the secondary meaning to the time of the alleged appropriation.

2. Trade-marks and trade-names and unfair competition 🔑71

The acquisition of a "secondary meaning" which identifies title in public mind with literary work creates a right akin to a property right, but without such acquisition there is no right.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Secondary Meaning".

3. Trade-marks and trade-names and unfair competition 🔑71

A "secondary meaning" which identifies title in public mind with literary work signifies that title attained popularity.

4. Trade-marks and trade-names and unfair competition 🔑93(1)

In action for damages for alleged appropriation of stage play title "Slightly Scandalous" as the title of a motion picture, burden was upon author to establish his allegations that the title acquired a secondary meaning, that the title became popular, and was so identified in mind of public throughout the United States as to mean only the author's play.

5. Trade-marks and trade-names and unfair competition 🔑68(2.18)

Where it was alleged that the stage play title "Slightly Scandalous" had been appropriated as the title of a motion picture, the essence of the alleged wrong was the distribution of a motion picture which, from its title, the public generally would mistakenly conclude was made from the play.

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* Subsequent opinion 222 P.2d 433.

6. Trade-marks and trade-names and unfair competition 🔑93(3)

In action by author for damages for alleged appropriation of stage play title "Slightly Scandalous" as the title of motion picture, failure to establish either the acquisition or retention of a secondary meaning would preclude recovery.

7. Trade-marks and trade-names and unfair competition 🔑71

Whether title of a play has acquired a secondary meaning which will provide basis for recovery of damages for its appropriation by another depends upon length of use of title, nature and extent of popularizing and advertising, and efforts made in promoting a conscious connection in minds of public between title and play.

8. Trade-marks and trade-names and unfair competition 🔑28

Right to exclusive use of a title grows out of its use and not its mere adoption.

9. Trade-marks and trade-names and unfair competition 🔑71

Generally, a reasonable duration of use is a factor tending to establish existence of a secondary meaning.

10. Trade-marks and trade-names and unfair competition 🔑71

Criterion of whether the title has acquired a secondary meaning is achievement of result and not effort expended, and hence a secondary meaning is not shown merely by evidence that a title has been widely advertised.

11. Trade-marks and trade-names and unfair competition 🔑71

Generally, whether a title has acquired or retained a secondary meaning is a question of fact but it becomes one of law when from the facts only a single inference and one conclusion may be drawn.

12. Appeal and error 🔑842(7)

Where there is no conflict in the evidence on an issue, implied finding on that issue amounts to a conclusion of law and finding is not binding on a reviewing court.

13. Trade-marks and trade-names and unfair competition 🔑71

The fact that in rare instances plays which are unsuccessful on Broadway later are made into successful motion pictures with the same or different title did not tend to prove that title of play had acquired secondary meaning which would serve as basis for recovery of damages for alleged appropriation of title as the title of a motion picture.

14. Trade-marks and trade-names and unfair competition 🔑93(2)

The alleged fact that stage play title "Slightly Scandalous" had an inherent appeal to certain classes of the public was of no consequence in determining right to recover damages for alleged appropriation of the title as the title of a motion picture.

15. Trade-marks and trade-names and unfair competition 🔑71

The creator of a stage play title has no right in the title disassociated from the play, and before the creator can recover damages for alleged appropriation of the title as the title of a motion picture, the title must have become popular as denoting the play in the minds of the public.

16. Trade-marks and trade-names and unfair competition 🔑71

Reaction of the public rather than that of experts in field of drama is the decisive factor in determining whether title of stage play has acquired and retained a secondary meaning which would give creator right to exclusive use thereof.

17. Trade-marks and trade-names and unfair competition 🔑93(3)

The testimony of one member of the public is insufficient to establish that title of stage play retained popularity, widespread recognition, notoriety, and identification in minds of public as denoting stage play so as to supply basis for recovery of damages for alleged appropriation of title as title of a motion picture.

18. Trade-marks and trade-names and unfair competition 🔑32

Where a stage play is dormant for such a length of time and under such circumstances that the title no longer signifies the play in minds of the public, right to the title is lost.

19. Trade-marks and trade-names and unfair competition ⚷71

Title of unsuccessful stage play "Slightly Scandalous", which had been publicized at a cost of $3,343.20, and which played only in Philadelphia and New York to a total of 3,750 persons, had not acquired or retained a secondary meaning in relation to the play so as to entitle author to exclusive use thereof, and author was not entitled to recover damages for alleged appropriation of the title as the title of a motion picture which was released two years later, but which except for the title bore no similarity to the play.

20. Trade-marks and trade-names and unfair competition ⚷93(3)

In action by author for damages for alleged appropriation of stage play title "Slightly Scandalous" as the title of a motion picture, evidence was insufficient to warrant implied finding that the title had acquired and retained a secondary meaning in relation to the play, in view of evidence among other things that play had not been widely publicized, that the play was unsuccessful, and that the motion picture was not released until more than two years after last showing of play.

21. Trade-marks and trade-names and unfair competition ⚷99

In action by author for damages for alleged appropriation of stage play title, "Slightly Scandalous" as the title of a motion picture, instruction that author did not have any right in mere title and that motion picture producers had right to use the title unless it had acquired and retained a secondary meaning was appropriate.

22. Trial ⚷119

Questions by counsel which did not prove or tend to prove any issue in the case and created prejudice in minds of jurors, were improper.

◆

Loeb & Loeb, Adrian A. Kragen and Harry B. Swerdlow, Los Angeles, for appellants.

Harold A. Fendler, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal from a judgment for plaintiff entered on a verdict of a jury in an action for damages for the alleged appropriation of the title of a stage play—"Slightly Scandalous"—as the title of a motion picture.

Frederick Jackson, respondent, a writer with about 40 years experience, in 1943 wrote a stage play finally titled "Slightly Scandalous." In the spring of 1944 the play was privately rehearsed. On April 26, 1944, while it was in rehearsal, a publicity man was employed to exploit it, his employment to begin May 8, 1944. On May 4, 1944, a one-inch item in a single column appeared in The Hollywood Reporter, a trade journal, saying that the play, naming the star as Janet Beecher, would open in Philadelphia on May 29 and in New York on June 14, 1944. On May 9, a small item appeared in the Los Angeles Evening Herald-Express to the effect that the author was putting final directorial touches on "Slightly Scandalous" before it left for a Philadelphia pre-New York opening May 28, and that Janet Beecher was the star. On May 10, 1944, Variety, a theatrical publication read generally by people in the theater and motion picture industries, published in New York and on sale at newsstands in the principal cities of the country, carried "Slightly Scandalous" as among "Shows in Rehearsal." On May 11, 1944, the Los Angeles Times, in a New York-dated story principally about another play, said that the title of the play in which Janet Beecher was to be starred had been changed to "Slightly Scandalous", that it would immediately go into rehearsal in Hollywood, and be due in New York in June.

Prior to and during its Philadelphia and New York run, the play was advertised in newspapers and on billboards and "heralds" were printed for distribution in hotels and restaurants. The advertising campaign conducted in Philadelphia consisted principally of the following: From May 21 to June 3 (exclusive of Sundays), five Philadelphia newspapers published advertisements consisting of 10 to 14 lines each, and one newspaper published 25 lines on two days. One of the five newspapers on two weekdays during that period published a 60-line advertisement. From June 5 to June 10 the same five newspapers published a daily advertisement consisting of 8 to 13 lines, with the exception of one which on one weekday published a 60-line advertisement. On three successive Sundays—May 21, May 28, and June 4—three Philadelphia newspapers published an advertisement consisting of 40 to 60 lines. In addition to the foregoing, 20,000 "heralds" were printed for placement in hotels and restaurants, 50 "24-sheets" of outdoor advertising were posted on billboards, single- and double-column pictures of the star of the production were prepared and presented to the newspapers, as well as other miscellaneous forms of advertisements.

The advertising in New York was mainly as follows: on June 8, 9, 10 and 12, four of the principal New York newspapers published a 12 to 13-line advertisement. On Sunday, June 11, five New York newspapers, including the four noted above, published a 50-line advertisement, and one newspaper—The Brooklyn Eagle—published a 12-line advertisement. On June 13, 14, 15, 16 and 17, ten New York newspapers (including the four noted above) published a 6 to 13-line advertisement. There is also evidence that bills were paid for typing a number of publicity stories, but no evidence that any of them was published. As near as we can estimate from the record, the total expenditure for advertising and publicity was $3,343.20.

The play opened in Philadelphia on May 29, 1944. After the opening it was "panned" in all Philadelphia newspapers. There were 15 performances in less than two weeks. The attendance did not exceed 3,000 persons, an average of 200 persons each performance. The capacity of the theater was in excess of 1,500 persons.

The play opened in New York on June 13, 1944, and closed June 17, 1944. During its New York run the play was "panned" by the newspapers. There were 7 performances, 5 nights and 2 matinees. The attendance did not exceed 750 persons, an average of about 100 persons each performance. The capacity of the theater was in excess of 1,000 persons. The play was a "flop."

The play was not presented anywhere after June 17, 1944, and there was no mention of it in any public press in this country from June 17, 1944, to the time of trial. On August 2, 1946, appellants released and distributed throughout the country a motion picture titled "Slightly Scandalous." Respondent's play was a farce. Appellants' picture was a musical comedy. There was no similarity whatever between the picture and the play except the title.

The complaint alleged that at all times since the first public production and presentation of the play on May 29, 1944, the title "Slightly Scandalous" acquired widespread recognition, notoriety, and identification in the minds of the general public as the title of plaintiff's play; that the public generally throughout the United States had at all times since May 29, 1944, identified the title "Slightly Scandalous" with plaintiff's play; and that the title acquired, and since May 29, 1944 had continued to retain, a secondary meaning in the minds of the general public throughout the United States solely identifying plaintiff's play with said title. The verdict was for the plaintiff for $17,500.

Appellants, as grounds for reversal, contend (1) the evidence was insufficient to justify a verdict that the title "Slightly Scandalous" had acquired and retained a secondary meaning in relation to respondent's stage play; (2) the court erred in instructions given and refused; (3) the instructions were confusing and contradictory; (4) the damages awarded were excessive; and (5) counsel for respondent was guilty of prejudicial misconduct resulting in a miscarriage of justice.

The principal question to be decided is whether the evidence was sufficient to justify the implied finding of the jury that the title of the play—"Slightly Scandalous"—had acquired and retained a secondary meaning in relation to the stage play. This is not a case of a charge that appellants passed off the picture as respondent's play. The respondent merely claims that appellants appropriated the title.

[1, 2] An author of a play has no right in the mere title given to his production. Paramore v. Mack Sennett, Inc., D.C., 9 F.2d 66, 67; Martenet v. United Artists Corporation, D.C., 56 F.Supp. 639, 640. To warrant an award of damages for the alleged appropriation of the title of a play there must be (1) priority of adoption; (2) the title must have been so used as to have acquired a secondary meaning which identifies it in the public mind with the play; and (3) there must be retention of the secondary meaning to the time of the alleged appropriation. Warner Bros. Pictures v. Majestic Pictures Corp., 2 Cir., 70 F.2d 310, 311; Amusement Securities Corp. v. Academy Pictures D. Corp., 162 Misc. 608; 294 N.Y.S. 279; Selig Polyscope Co. v. Unicorn Film S. Corp., Sup., 163 N.Y.S. 62; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 893; Golenpaul v. Rosett, 174 Misc. 114, 18 N.Y.S.2d 889, 892, 893. The acquisition of a secondary meaning creates a right akin to a property right. Without such acquisition there is no right.

[3–6] Acquiring a secondary meaning signifies that the title attained popularity. Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 810, 187 P.2d 474. The burden was upon respondent to establish the allegations of his complaint that the title "Slightly Scandalous" acquired a secondary meaning—acquired widespread recognition and notoriety—that the title became popular, and was so identified in the minds of the general public throughout the United States as to mean only respondent's play. The essence of appellants' wrong, if one was committed, was in the distribution of a motion picture which, from its title, the public generally would mistakenly conclude was made from respondent's play. See Armstrong Paint & V. Works v. Nu-Enamel Corp., 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195, 207. If respondent failed to establish a secondary meaning or if he failed to establish that a secondary meaning once acquired was retained, such lack of proof is fatal to his action. American Fork & Hoe Co. v. Stampit Corporation, 6 Cir., 125 F.2d 472, 475; De Long Hook & Eye Co. v. Hump Hairpin Mfg. Co., 297 Ill. 359, 130 N.E. 765, 768, 769.

[7-9] In determining whether a title of a play has acquired a secondary meaning three elements are primarily to be considered: (1) The length of use of the title, (2) the nature and extent of popularizing and advertising such title, and (3) the efforts in promoting a conscious connection in the minds of the public of the title with the play. See, annotation 150 A.L.R. 1082, and cases there cited. One's right to the exclusive use of a title grows out of its use and not its mere adoption. Rest. Torts, secs. 715, 716. Generally a reasonable duration of use is a factor tending to establish—and, conversely, want of a reasonable period of time within which a title has been used is a factor tending to disprove—the existence of a secondary meaning. Annotations: 150 A.L.R. 1088, and cases there cited; 40 A.L.R. 433.

[10] A secondary meaning is not shown merely by evidence that a title has been widely advertised for a period of time. This is true because the criterion is the achievement of a result and not the effort expended in the result. DuPont Cellophane Co. v. Waxed Products Co., 2 Cir., 85 F.2d 75, certiorari denied 299 U.S. 609, 57 S.Ct. 194, 81 L.Ed. 443; Upjohn Co. v. Wm. S. Merrell Chemical Co., 6 Cir., 269 F. 209, 214, certiorari denied 257 U.S. 638, 42 S.Ct. 50, 66 L.Ed. 410.

[11, 12] Generally the question whether a title has acquired or retained a secondary meaning is one of fact, Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 813, 187 P.2d 474, but it becomes one of law when from the facts only a single inference and one conclusion may be drawn. San Diego Trust & Savings Bank v. San Diego, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416; Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812. Where there is no conflict in the evidence on an issue, the implied finding on that issue amounts to a conclusion of law and the finding is not binding on a reviewing court. San Diego Trust & Savings Bank v. San Diego, 16 Cal.2d 142, 153, 105 P.2d 94,

133 A.L.R. 416; Free v. Sluss, 87 Cal.App. 2d Supp. 933, 936, 197 P.2d 854. There are no conflicting inferences which reasonably can be drawn from the evidence in the present case with respect to the issues of acquisition and retention of a secondary meaning, and there is no substantial evidence which lends any support to the implied findings with respect thereto.

The ultimate test of a secondary meaning here is whether the title had become broadly known to the public as denoting respondent's play. There is no evidence whatever that the title became popular or acquired notoriety as denoting respondent's play. The only reasonable inference deducible from the evidence is that the play was extremely unpopular. There is no evidence that the advertising done—whether it was extensive as claimed by respondent or a minimum as claimed by appellants—had the effect of popularizing either the play or the title. Whether the effort expended in advertising was great or small, no results were achieved. The only reasonable inference that may be drawn from the evidence is that the advertising was of no value. No results followed. The play was not well received by the public. It was "a flop, a dud."

[13] The fact that in rare instances plays which are unsuccessful on Broadway later are made into successful motion pictures with the same or a different title does not tend to prove that the title of respondent's play acquired a secondary meaning. This is particularly true in the present case where the major motion picture producers at the instance of respondent covered the play in Philadelphia or New York and in each instance reported critically thereon and where the play, together with the title, was rejected by every motion picture producer to whom it was offered.

[14, 15] The fact, if it be a fact, that the title "Slightly Scandalous" in and of itself has an inherent appeal to certain classes of the public, as suggested by respondent, is of no consequence. The creator of a title of a play has no right in the title disassociated from the play. The title must have become popular as denoting the play in the minds of the public.

Respondent, for the purpose of establishing that the title retained a secondary meaning, produced five witnesses—four of them experts in the field of drama, none of the four a representative member of the public. Three of the experts in the field of drama testified that they had seen reviews or advertisements of the play in June, 1944, and that after the release of the picture they had seen some advertising about it and thought that the picture was based on the play. The fourth had attended rehearsals traveled with the cast to, and attended two performances in, Philadelphia and two in New York. A few years later, when told that there was a motion picture out with the title "Slightly Scandalous", she thought it was "the same play that Mr. Jackson wrote." The fifth witness was one who may be classified as a member of the public. He reads the theater page of the New York Times every day. He saw an unfavorable review of the play in the Times in June, 1944. In 1946 or 1947 he saw an advertisement of the picture. He thought there was some connection between the motion picture and the play. He wondered why the title was used in the motion picture after the bad notices it received as a play.

[16-18] The reaction of the public rather than that of experts in the field of drama is the decisive factor in determining whether a title has acquired and retained a secondary meaning. Steem-Electric Corp. v. Herzfield-Phillipson Co., 7 Cir., 118 F.2d 122, 124-125; Selchow & Righter Co. v. Western Print. & Lith. Co., D.C., 47 F.Supp. 322, 326; Skinner Mfg. Co. v. General Food Sales Co., D.C., 52 F.Supp. 432, 447, 448. The testimony of one witness, who may be classified as a member of the public, is insufficient to establish that the title retained popularity, widespread recognition, notoriety, and identification in the minds of the public as denoting respondent's play. See, McGraw-Hill Pub. Co. v. American Aviation Associates, 73 App.D.C. 131, 117 F.2d 293, 295; Orth v. Paramount Pictures, 311 Mass. 580, 587, 42 N.E.2d 524, 527. There is no evidence of a single instance of any one attending the picture in the mistaken

belief that it was respondent's play. When a play, to which a title is attached, is dormant for such a length of time and under such circumstances that the title no longer signifies that play in the minds of the public, the right to the title is lost. Golenpaul v. Rosett, 18 N.Y.S.2d 889, 893, 174 Misc. 114, and cases there cited.

It has been held, upon much more extensive and stronger evidence than appears in the present case, that a title had not acquired a secondary meaning. Ott v. Keith Massachusetts Corporation, 309 Mass. 189, 34 N.E.2d 683; Manners v. Triangle Film Corp., 2 Cir., 247 F. 301, 303; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 893; Whitman v. Metro-Goldwyn-Mayer Corporation, 289 N.Y.S. 961, 159 Misc. 850; Golenpaul v. Rosett, 18 N.Y.S.2d 889, 892, 174 Misc. 114; Collins v. Metro-Goldwyn Pictures Corporation, D.C., 25 F.Supp. 781; Bowers v. Kugel, VIII The Trade Mark Reporter 400.

In Ott v. Keith Massachusetts Corporation, supra, 309 Mass. 189, 34 N.E.2d 683, 684, the plaintiff wrote a play which in 1919 he titled "That's Right. You're Wrong." It was played in the season of 1919-1920 in some towns in New England and New York. The court said, "The plaintiff, the play in question, and its title, have long been forgotten by the public, and are remembered only by a few veterans of the theatre." In 1939, the defendant produced and exhibited a motion picture titled "That's right, you're wrong", featuring Kay Kyser. In that case, as in the case at bar, there was no similarity between the picture and the play except the title. The court held, 34 N.E. 2d at pages 684-685: "The title 'is a term of description, which serves to identify the work; but any other person can with impunity adopt it, and apply it to any other book, or to any trade commodity, provided he does not use it as a false token, to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated.' Black v. Ehrich, C.C., 44 F. 793, 794. In the present case only a small part of the American public ever saw the plaintiff's play when it was performed two decades ago. In 1939 the play had long been buried in oblivion. The name called up no memory of the plaintiff or his play, but was meaningless to the public except as Kyser had given it a new meaning. Upon elementary principles of the law of unfair competition the plaintiff shows no case for relief. Jackman v. Calvert-Distillers Corp. of Massachusetts, 306 Mass. 423, 28 N.E.2d 430."

In Manners v. Triangle Film Corp., supra, 2 Cir., 247 F. 301, a play titled "Happiness" was presented in New York seven times in 1914, with Laurette Taylor, one of the best known actresses of her day, playing the lead. In 1915 the author advertised extensively in the newspapers that he intended to present a play under that title with Laurette Taylor. The play was not presented the second time. In early 1917 the defendant titled a picture in production "Happiness", released and distributed it on May 29, 1917. On June 18, 1917, an injunction pendente lite was granted. In reversing the order granting the injunction the court, inter alia, said, 247 F. at page 303: "Our view is, not that the affidavits show that the complainant had abandoned his rights in the title 'Happiness,' but that they do not show that he had ever obtained a prior right to or any monopoly in the word because of seven matinée performances of a one-act sketch in New York City in 1914. The word 'Happiness,' being public property, must, in order to acquire a secondary significance, have been used generally in connection with a play, and so have become known to the public said to be likely to be misled, viz., the public throughout the United States."

In Becker v. Loew's Inc., supra, 7 Cir., 133 F.2d 889, about 700 copies of a book, titled "We Who Are Young", were distributed by gift or sale. The book was reviewed in some newspapers shortly after its publication in 1936. In 1940 the defendant released a motion picture, titled "We Who Are Young". In reversing a judgment for the plaintiff, the court stated, 133 F.2d at page 893: "Plaintiff rests his claim of unfair competition largely on the appropriation of his book's title. To be protected, however, a title must have attained a secondary significance, so that mention of the title would lead another person to think of the book. The name of plaintiff's book had not acquired and retained this secondary meaning at the time the defendant's picture was released. A span of nearly four years intervened between the publication of the book in 1936 and the first showing of defendant's photoplay in 1940; during this time many people who had seen plaintiff's book on exhibition in a bookstore window or had read a review of it in a newspaper would have forgotten it. Since the overwhelming majority of the total number of copies of plaintiff's book which were distributed were disposed of in 1936, only a few being sold in 1937, after which time sales virtually ceased, it is not unlikely that many persons who had acquired the book had no such fresh recollection of it as to connect it with a movie title which appeared four years later. Moreover, the book had only a very limited distribution, probably fewer than 700 copies in all. Even in instances where a book was currently being sold and had sales of 10,000 copies plus favorable reviews in metropolitan newspapers having a circulation running into millions, an injunction restraining the use of an identical title for a motion picture has been denied. Collins v. Metro-Goldwyn, etc., Corp., D.C., 25 F.Supp. 781."

In Whitman v. Metro-Goldwyn-Mayer Corporation, supra, 159 Misc. 850, 289 N.Y.S. 961, the plaintiffs in April, 1933, produced a picture titled "Inflation." It was exhibited in several theatres in June and July, 1933. It did not attain popularity. At the instance of the plaintiffs, representatives of the defendants viewed the picture and rejected it as unsatisfactory for the defendants' use. In June, 1933, the defendants produced and exhibited a motion picture titled "Inflation." The court held that since the plaintiffs' picture was hardly known the defendants had a perfect right to use its title.

In Bowers v. Kugel, supra, VIII The Trade Mark Reporter 400, the plaintiff in 1910 and 1911 wrote a play, titled "The Unborn." It was accepted for production by the Medical Review of Reviews, under the auspices of which a private matinée performance in a New York theater was given in November, 1915, and 8 public performances were given at another New York theater during a week in December, 1915. The author and play received some notices in the New York papers in connection with the initial production. An article about the play was published in Hearst's Magazine in March, 1916. The play was given further newspaper publicity due to the attempt of the Commissioner of Licenses of New York to prevent its production. No further presentation of the play was given either upon the legitimate stage or in motion pictures. In July, 1916, the defendants exhibited in various places throughout the United States a picture, titled "The Unborn." The producers of the picture knew the content of the play and its title before release of the picture. The court held that the title of the play had not acquired a secondary meaning and that the defendants could use the title with impunity.

In the cases in which it has been held that a title of literary property had acquired and retained a secondary meaning, it was because there was evidence of great or widespread popularity of the literary property, or extended production thereof, or it had been produced with great or unusual success. Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 813, 187 P.2d 474, [attained "great popularity"] ; Aronson v. Fleckenstein, C.C., 28 F. 75, 76 ["met with signal success and public approval"] ; Frohman v. Payton, 34 Misc. 275, 68 N.Y.S. 849, ["achieved unusual success"] ; Hopkins Amusement Co. v. Frohman, 202 Ill. 541, 67 N.E. 391, 392 [produced "in the principal cities of the United States" with large receipts] ; Klaw v. General Film Co., Sup., 154 N.Y.S. 988 [presented continuously for more than 4 years "throughout the United States and Canada with success"] ; Selig Polyscope Co. v. Unicorn Film S. Corp., Sup., 163 N.Y.S. 62, 63 ["successfully produced" for 5 successive seasons "with marked acceptance by the public"] ; National Picture Theatres v. Foundation Film Corp., 2 Cir., 266 F. 208, 209 ["wide popularity over considerable portions of the United States"]; Paramore v. Mack Sennett, Inc., D.C., 9 F.2d 66, 68 [attained "considerable notoriety"] ; Amusement S. Corp. v. Academy Pictures D. Corp., 162 Misc. 608, 294 N.Y.S. 279, 293, 296, ["widespread popularity throughout the United States and in foreign countries" and a "wide association in the minds of moving picture goers with a successful photoplay"] ; see, also, Warner Bros. Pictures v. Majestic Pictures Corp., 2 Cir., 70 F.2d 310; Patten v. Superior Talking Pictures, Inc., D.C., 8 F.Supp. 196.

[19, 20] It is clear that the play "Slightly Scandalous" did not gain any public favor. It was moribund and had been so for more than two years at the time appellants released the picture. Neither the publicity nor the productions in Philadelphia and New York gave the title any real currency. We agree with appellants' counsel that to uphold "a finding that the title of respondent's play had acquired a secondary meaning so that the general public at any time associated the title 'Slightly Scandalous' with respondent's play would mean that any play produced in a metropolitan center and advertised in the metropolitan papers would acquire a secondary meaning regardless of the length of its run, its acceptance by the general public, or of any other factor which would or would not make it stand out in the public's mind."

We conclude that the evidence was not sufficient to warrant the implied findings that the title "Slightly Scandalous" acquired and retained a secondary meaning in relation to respondent's play.

[21] We need not consider appellants' claim that the damages awarded were excessive or their claims of error with respect to instructions. Suffice it to say that, in the event the cause is retried by a jury, they should be clearly and definitely instructed that respondent did not have any right in the mere title "Slightly Scandalous" and that appellants had a legal right to use the title unless it had acquired and retained a secondary meaning as defined herein.

[22] In view of the necessity of a reversal it is also unnecessary to discuss appellants' claim that counsel for respondent was guilty of prejudicial misconduct. The claim is based upon the asking of questions which did not prove or tend to prove any issue in the case and which, no doubt, created prejudice against appellants in the minds of the jurors. It is enough now to say that the questions were improper and should not be asked again.

Reversed.

SHINN, P. J., and WOOD, J., concur.

95 Cal.App.2d 200

PEOPLE v. LUSE.

Cr. 4370.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1949.

Hearing Denied Jan. 16, 1950.

A. F. Luse was convicted in the Superior Court for Los Angeles County, Charles W. Fricke, J., for forgery, and for violating the statute penalizing persons who knowingly procure any forged instrument to be filed in any public office, and he appealed.

The District Court of Appeal, McComb, J., affirmed the judgment, and held that there was substantial evidence to sustain the judgments and to show that the crimes were committed within the county within three years prior to filing of the informations. The court also held that the statute permitting the court to restrict argument to one counsel on each side in prosecutions for offenses other than those punishable by death is constitutional, and that no prejudicial error appeared in refusing argument by more than one counsel, or in denying a new trial.

1. Forgery ⚷44

Evidence supported conviction for forgery of stock certificates.

2. Forgery ⚷44

Evidence supported conviction for violation of statute penalizing persons who knowingly procure a forged instrument to be recorded in a public office. Pen.Code, § 115.

3. Criminal law ⚿147

Where stock certificates stood in wife's name on December 4, 1944, and informations were filed March 13, 1947, against husband, prosecution of husband for forging his name to the certificates was not barred by the three year statute of limitations.

4. Criminal law ⚿149

Where each of 12 forged instruments was filed in official county records on or subsequent to June 25, 1945, and informations were filed March 13, 1947, prosecution for filing forged instruments was not barred by three year statute of limitations since statute begins to run from date document is filed and not from date instrument was drawn. Pen.Code, § 115.

5. Constitutional law ⚿268

The Fourteenth Amendment does not prevent a state from adopting a reasonable regulation of procedure in relation to jury trials. U.S.C.A.Const. Amend. 14.

6. Criminal law ⚿633(1)

A state is not bound by any provision of the federal constitution to follow practice and procedure which existed at common law, but may make such changes as may be necessary.

7. Criminal law ⚿711

The statute providing that if indictment or information be for any offense other than one punishable by death, court may in its discretion restrict argument to one counsel on each side is constitutional. Pen.Code, § 1095.

8. Criminal law ⚿1171(1)

In prosecution for forgery and for filing forged instruments in public offices, refusal to allow defendant to be represented before jury by more than one counsel was not prejudicial error. Pen.Code, § 1095.

9. Criminal law ⚿1176

In prosecution for forgery and for recording forged instruments in public offices, denial of defendant's motion for new trial was not prejudicial error. Pen.Code, § 115.

Morris Lavine and Russell Parsons, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Howard S. Goldin, Deputy Attorney General, for respondent.

McCOMB, Justice.

From judgments of guilty on (1) three counts of forgery and (2) twelve counts of violating section 115 of the Penal Code[1] after trial before a jury, defendant appeals.

The record being viewed pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685, discloses these facts: Defendant altered without authority three stock certificates of the Mo-Lo corporation and filed or caused to be filed for record more than twelve false or forged documents.

Questions: First: *Was there substantial evidence to sustain the judgments of guilty?*

This question must be answered in the affirmative.

Counts 1 to 3 Inclusive

Witness testified that in April, 1941, defendant caused the Mo-Lo corporation to issue to his wife, Mrs. Gladys P. Luse, 3 stock certificates in which her name appeared as the owner. She placed these stock certificates in her safe deposit vault where they remained until the first part of 1944. She then noticed that they were not in her box and learned upon inquiry from defendant that he had removed them and taken them to his office. Difficulties having arisen between defendant and his wife she employed an attorney and on November 14, 1944, defendant delivered to the attorney the 3 stock certificates just mentioned which showed Gladys P. Luse as the owner. Defendant admitted that after he had received the certificates back from Mrs. Luse's attorney he scratched out the name of Mrs. Luse on each of the stock certificates and inserted in lieu thereof the name of his mother. Mrs. Luse testified that she had never authorized defendant to make any changes in the certificates.

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[1] Section 115 of the Penal Code reads: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state of the United States, is guilty of felony."

[1] Clearly the foregoing constitutes substantial evidence to sustain the jury's verdict of guilty on counts 1, 2 and 3.

Counts 4 to 15 Inclusive

[2] An examination of the record discloses that defendant recorded or caused to be recorded more than 12 documents each of which was false. It would serve no useful purpose to detail each and every document and the method used by defendant to obtain or create it. It is sufficient to give a typical example of the way defendant operated, to wit:

Witness King testified that he had a conversation with defendant relative to people's exhibit 4, which purported to be a power of attorney and assignment signed by defendant's wife, Gladys P. Luse, and which document was filed October 5, 1945 in the official records of Los Angeles county. The witness testified that defendant referred to this document as "his masterpiece", and that he explained to the witness how he had fraudulently obtained his wife's signature to the document and how he had obtained through fraud the notary's acknowledgement to the instrument.

Defendant's wife stated that she first saw people's exhibit 4 when it was shown to her in court, that she had never executed any assignment of her interest to defendant, and that she had refused his request for a written power of attorney.

Second: *Was there substantial evidence to show that the crimes were committed in Los Angeles county within three years prior to the filing of the informations?*

This question must likewise be answered in the affirmative. The informations were filed March 13, 1947.

Counts 1 to 3 Inclusive

[3] The record discloses that on December 4, 1944, defendant's attorney stated to counsel for Mrs. Luse that the stock certificates stood in her name. Therefore the alteration which defendant admits having made took place subsequent to that date, which was within three years before the date of the filing of the information.

Counts 4 to 15 Inclusive

[4] Each of 12 forged instruments was filed in the official records of Los Angeles county on or subsequent to June 25, 1945, and the law is settled that the statute of limitations commences to run from the date the document is filed for record and not from the date the instrument was drawn. People v. McPherson, 6 Cal.App. 266, 269 et seq., 91 P. 1098.

It is clear that the statute of limitations had not run on the offenses charged in counts 4 to 15 inclusive.

Third: *Is section 1095 of the Penal Code*[2] *constitutional?*

[5-8] This question must be answered in the affirmative. In People v. Jones, 123 Cal. 65, 69, 55 P. 698, the court approved the section and the action of the trial court thereunder limiting argument to one counsel. People v. Fair, 43 Cal. 137, 152, also points out that such procedure has been utilized since 1850. In People v. Hickman, 204 Cal. 470, 478, 268 P. 909, 913, 270 P. 1117, the court held that "there is nothing in the Fourteenth Amendment to prevent a state from adopting a reasonable regulation of procedure in relation to jury trials." The court also stated that the state "is not tied down by any provision of the federal Constitution to the practice and procedure which existed at common law" but "it may avail itself of the wisdom gathered by experience to make such changes as may be necessary." The courts having utilized

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2. Section 1095 of the Penal Code reads: "If the indictment or information be for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side."

the limitation in the past, and its use having been approved by the Supreme Court, it may not now be attacked on the ground of constitutional invalidity. In the Hickman case, supra, the court on similar reasoning refused to hold unconstitutional a procedural statute relating to criminal trials. The recognition, utilization and approval by the courts in the past of section 1095 of the Penal Code is sufficient attestation of its constitutionality. Therefore the trial judge in the instant case did not commit prejudicial error in refusing to allow defendant to be represented before the jury by more than one counsel.

Fourth: *Did the trial court commit prejudicial error in denying defendant's motion for a new trial?*

[9] This question must be answered in the negative. Since the same questions were urged on the motion for a new trial as defendant presents upon the appeal from the judgments and which we have held to be without merit, there was no error.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

95 Cal.App.2d 293

PEOPLE v. GOSSMAN.

Cr. 4380.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1949.

Hearing Denied Jan. 19, 1950.

Joe Gossman was convicted in the Superior Court of Los Angeles County, Walter S. Gates, J., for a violation of statute making it a misdemeanor for any person under the influence of intoxicating liquor to drive a vehicle upon any highway upon an accusation that he violated the statute making it felony to drive an automobile while intoxicated and perform any act forbidden by law or neglect any duty imposed by law, which act proximately causes bodily injury to any person, and he appealed.

The District Court of Appeal, Shinn, P. J., held that the statute which defendant was accused of violating included the statute the violation of which he was convicted, and affirmed the conviction.

1. Automobiles ⟹355(6)

Evidence sustained conviction for driving a vehicle upon the highway while under the influence of intoxicating liquor in violation of statute. Vehicle Code, § 502.

2. Automobiles ⟹351

An accusation under statute making it a felony when any person under influence of intoxicating liquor, while driving a vehicle, does any act forbidden by law or neglects any duty imposed by law in driving of such vehicle causing bodily injury to any other person, will support a conviction for violation of the statute making it unlawful for any person under the influence of intoxicating liquor to drive a vehicle upon any highway. Vehicle Code, §§ 501, 502.

3. Criminal law ⟹1209

Where different offenses are involved, the rationale of the constitutional provision and the statutory rule against double punishment, is that punishment for a greater or a lesser offense, where both are founded upon a common basic element, necessarily includes punishment for the other. Const. art. 1, § 13; Pen.Code, § 1023.

4. Indictment and information ⟹191

A proper distinction between "included and non-included offenses" in a criminal statute is whether they involve essentially same or different elements of conduct, and if both offenses have a common basis, the greater offense is usually deemed to include the lesser.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Included Offenses".

5. Automobiles ⟹332

Penal Code Section making it a misdemeanor to become intoxicated while driving a motor vehicle relates to driving on private property and is limited by those sections of the Vehicle Code making it a felony for any person under influence of intoxicating liquor to drive a vehicle, and when so driving do any act forbidden by law or neglect any duties imposed by law in driving such vehicle, which act or neglect proximately causes bodily injury to any person, and making it a misdemeanor for any person under the influence of intoxicating liquor to drive a vehicle upon any highway. Vehicle Code, §§ 501, 502; Pen.Code, § 367d.

6. Indictment and information ⚷189(1)

Where defendant was accused of violating statute making it a felony for any person under influence of intoxicating liquor to drive a vehicle and do any act forbidden by law and cause bodily injury to any person, his conviction of the violation of the statute making it a misdemeanor for any person under the influence of intoxicating liquor to drive vehicle upon highway was proper as an included offense. Vehicle Code. §§ 501, 502.

◆

Joe Gossman, in pro. per.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Appellant Joe Gossman was accused of violation of section 501, Vehicle Code, in a trial to the court was found guilty of violation of section 502 of the code and, after refusing to accept the court's offer of probation, was sentenced to thirty days in the county jail.

In brief, section 501 makes it an offense for any person under the influence of intoxicating liquor to drive a vehicle, and when so driving do any act forbidden by law or neglect any duty imposed by law in the driving of a vehicle, which act or neglect causes bodily injury to any person other than himself. The offense is made a felony. By section 502 it is made unlawful for any person who is under the influence of intoxicating liquor to drive in vehicle upon any highway. This offense is punishable by imprisonment in the county jail, or fine, or both.

There was evidence to establish that about 1:00 o'clock in the morning the defendant drove east on 28th Street, in Los Angeles, into the intersection of Griffith Avenue, where his car collided with one being driven north on Griffith Avenue by Sam Cason. Appellant's car crossed over Griffith Avenue and ran into the east curb. Three passengers in the Cason car were rather severely injured. Police officers soon arrived and found Gossman sitting in his car. Officer Barker testified that he smelled defendant's breath and it was strongly alcoholic; he asked him to walk a line and defendant was unable to do so; his car was examined and found to be in high gear. Defendant was taken to the receiving hospital and thence to the police station, where he was given a sobriety test. Officer Barker testified that in his opinion defendant was intoxicated. Officer McDowell testified that he smelled an alcoholic odor on defendant's breath. He and Cason and another witness testified that in their opinion defendant was intoxicated. Defendant stated that he had had two beers before supper, and thereafter only milk, and that when the accident occurred he was on his way to get a bottle of liquor for his wife. At the trial he denied that he had been drinking anything but milk and unfermented apple cider.

[1] Defendant's contention on the appeal that there was insufficient evidence to prove he was intoxicated is not sustained by the record. It was for the trial court to determine whether the witnesses for the People were deceived by defendant's speech and actions after the accident and whether his appearance and conduct, as described by them, and which indicated to them intoxication, were due to something else. Upon the evidence we have mentioned, the finding on that issue is conclusive.

[2-4] The point is made by defendant that he was wrongfully convicted of violation of section 502, under the information charging violation of section 501, for the reason that the latter offense does not include the former. We think it is an included offense. Where different offenses are involved the rationale of the constitutional provision (Art. 1, Sec. 13), and the statutory rule (Penal Code, sec. 1023), against double punishment is that punish-

ment for either a greater or a lesser offense, where both are founded upon a common basic element, necessarily includes punishment for the other. As a rule, in either case, complete expiation is rendered by satisfaction of the judgment. A proper ground of distinction between included and non-included offenses is whether they involve essentially the same or different elements of conduct. If they have a common basis the greater is usually deemed to include the lesser. Thus, in offenses against the person, simple assault is included in the more serious offenses that involve acts of personal violence, for the reason that the latter cannot be committed without committing the former. Homicide cases, in which the greater offenses include the lesser, have a common basis in the unlawful killing of a human being. Various offenses involving the unlawful taking of property include theft as a lesser offense.

[5, 6] The difficulties which the courts often encounter do not arise out of doubts as to the general rules, but in analyzing the elements of similarity and dissimilarity of related offenses, in order to determine whether one is necessarily included in the other. We have no such difficulty in the present case. In addition to sections 501 and 502 of the Vehicle Code we have section 367d of the Penal Code, by which it is made a misdemeanor to become or be intoxicated while driving a motor vehicle. The Penal Code section, as limited by the Vehicle Code, relates to driving on private property (People v. Lewis, 4 Cal.App. Supp.2d 775, 37 P.2d 752; section 502 to driving on a highway; and section 501 to driving either on private property or a highway in an unlawful manner, and so as to proximately cause bodily injury to any person other than the driver. While the offenses defined by sections 367d and 502 vary as to circumstances, and section 501 encompasses additional circumstances and consequences, all three offenses have a common root in drunk driving. In order to establish a violation of section 501, it would be necessary to prove that the driving was done either on private property in violation of section 367d, or on a highway in violation of section 502. In a prosecution under 501 it is not necessary to charge also a violation of section 502 (People v. Stanley, 13 Cal.App.2d 559, 57 P.2d 146); and for the reasons stated in that case it is not necessary to charge violation of section 367d. A conviction of violation of section 501 would undoubtedly bar a further prosecution under either of the other sections for the reason that they are included offenses. We conclude that in a prosecution under 501 the accused may be convicted of violation of either section 502 or 367d. So closely allied are the offenses defined in the former and the latter sections that it would have been logical for the legislature to make driving while intoxicated a single offense, punishable as a misdemeanor in the circumstances specified in sections 502 and 367d, and as a felony under the conditions stated in section 501. See People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321.

We have examined the many other points argued by appellant and find them without support in the record, or lacking in merit for other reasons.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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95 Cal.App.2d 174

In re BAYLY'S ESTATE.
DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA v. BAYLY.

No. 14160.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1949.

Hearing Denied Feb. 16, 1950.

Proceeding in the matter of the estate and guardianship of James H. Bayly an incompetent person, wherein the Department of Mental Hygiene of the State of California filed a claim for care and maintenance, opposed by Richard W. Bayly, Guardian of the estate and person of James H. Bayly.

The Superior Court, in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered a decree denying the petition, and petitioner appealed.

The District Court of Appeal, Bray, J., affirmed the decree and held that the guardian of the incompetent war veteran could not be compelled to pay the state's claim for care and maintenance supplied prior to the appointment of the guardian out of compensation and disability allowances paid by the United States to the guardian.

1. Army and navy ⚷51

Guardian of the estate of an incompetent war veteran could not be compelled to pay claim for maintenance of veteran in state hospital incurred prior to appointment of guardian out of compensation and disability allowances paid by United States to guardian. Welfare and Institutions Code, §§ 6650, 6655; World War Veteran's Act of 1924, § 1 et seq., as amended, 38 U.S.C.A. § 421 et seq.

2. Army and navy ⚷51

Compensation and disability allowances paid by United States to guardian of incompetent war veteran are not exempt from a claim for care and maintenance supplied by the state after the appointment of the guardian. Welfare and Institutions Code, §§ 6650, 6655; World War Veteran's Act, 1924, § 1 et seq., as amended, 38 U.S.C.A. § 421 et seq.

3. Exemptions ⚷77

State seeking to enforce claim for support and maintenance of incompetent war veteran which accrued prior to appointment of guardian out of disability payments by United States was a "creditor" within meaning of exemptions statutes and could not recover. Welfare and Institutions Code, §§ 6650, 6655; World War Veterans Act of 1924, § 1 et seq., as amended, 38 U.S.C.A. § 421 et seq.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Creditor".

4. Army and navy ⚷51

Where incompetent war veteran was committed to state hospital prior to appointment of guardian, state could not recover for support and maintenance of incompetent out of compensation and disability payments made by United States on theory that incompetent's estate should be held liable for such care and maintenance supplied by a de facto guardian. Welfare and Institutions Code, §§ 6650, 6655; World War Veterans Act of 1924, § 1 et seq., as amended, 38 U.S.C.A. § 421 et seq.

5. Army and navy ⚷51

Purpose of rule allowing state to recover for care and maintenance of incompetent war veteran out of compensation and disability payments paid by the United States which accrued only after appointment of guardian is to protect incompetent against depreciation of his estate by claims accruing before estate is protected by the watchful eye of a guardian.

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Fred N. Howser, Attorney General of the State of California, Elizabeth Palmer, Deputy Attorney General of the State of California, for appellant.

R. L. Husted, San Francisco, for respondent.

BRAY, Justice.

Appellant, Department of Mental Hygiene of the State of California, filed in the Estate and Guardianship of James H. Bayly, an incompetent person, a petition for "Order Instructing Guardian to Pay for Care, Support and Maintenance of Incompetent Person." Thereafter respondent guardian filed an account. The petition and the account were heard at the same time. The court entered a decree denying the petition and settling the account without any allowance as requested by appellant for the support and maintenance of said incompetent. From this decree the department appealed.

Facts.

There is no controversy as to the facts. Bayly, a war veteran, was committed to Napa State Hospital June 13, 1946, and has been there ever since. On October 9, 1947, approximately 16 months thereafter, respondent was appointed his guardian. His estate consists solely of funds received from the United States Government as compensation and disability allowance pursuant to the provisions of the World War Veterans' Act of 1924, 43 Stat. at Large, 607, 38 U.S.C.A. § 421 et seq. The guardian receives on behalf of the incompetent $60 per month. As of the date of the account, the guardian had received a total of $1350, and had a balance on hand of $1314.50. The director of the Department of Mental Hygiene determined the charge for board, care, maintenance and medical attention of the incompetent to be $40 per month, and such charge was regularly made from the date of his admission to the hospital until after the appointment of the guardian. The amount then due was $634.32, and it is this amount which appellant petitioned the probate court to order the guardian to allow and pay. The medical superintendent of the hospital has certified that the incompetent is chronically and permanently insane.

Question Involved.

The sole question is—are moneys received by the guardian of an incompetent war veteran as disability compensation exempt under either the statutes of the United States or of California, from enforced payment for board, care, maintenance and medical attention furnished by a state hospital to the incompetent prior to the appointment of his guardian.

Moneys Are Exempt.

[1] This question has been unequivocally answered in the affirmative in Re Estate of Ferarazza, 219 Cal. 668, 28 P.2d 670, where the facts were practically identical. (The only difference is that in that case the incompetent's estate did not have sufficient moneys to pay the entire claim of the state hospital, had it been allowed, while in the case at bar the estate has funds in excess of the claim presented. However, the decision in the Ferarazza case was in no wise based upon the shortage of funds, nor was that fact even discussed.)

Appellant concedes that the Ferarazza case is controlling her, but contends that the decision is wrong and did not consider two points which appellant is attempting to raise here. As an intermediate court, we are bound by the Ferarazza decision. Moreover, appellant's contentions neither compel nor suggest a contrary result.

1. Is The State a Creditor?

[2, 3] The first contention is that the state providing care, etc., to a war veteran should not have the status of a regular creditor as to its claim for that care. The purpose of the exemption statutes, argues appellant, is to protect the veteran from regular creditors so that he can provide board and room for himself. If the state provides them for him, the exemption should not be applied to its claim for reimbursement. The case mainly relied upon by appellant in support of this contention is In re Lewis' Estate, 1938, 287 Mich. 179, 283 N.W. 21. There, the incompetent was committed to the state hospital and the care and maintenance provided subsequent to the appointment of a guardian of the incompetent. The court held that pension payments from the United States to a dependent, incompetent child of a veteran, were not exempt from a claim for care and maintenance by the state hospital. Such is the law in California as to care and maintenance supplied by the state after the appointment of the guardian. Welfare & Institutions Code, § 6650, formerly Pol.Code, § 2176; Welfare & Institutions Code, § 6655, formerly Pol.Code, § 2181; Estate of Ferarazza, supra, 219 Cal. at page 669, 28 P.2d 670. The Lewis case did not deal with care and maintenance supplied prior to the appointment of the guardian, and hence is not in point.

The only case, other than the Ferarazza case, which discusses claims of this kind made for care and maintenance supplied prior to the guardian's appointment is In re Murphy's Committee, 134 Misc. 683, 236 N.Y.S. 343, modified in 227 App.Div. 839, 237 N.Y.S. 448. The first opinion held that the money from federal pensions in the hands of the committee could not be reached for any of the state's claim, in the absence of an express agreement between the committee and the state. This holding was modified to allow the claims which had accrued after the appointment of the committee. The real split of authority is on the question whether a claim for care and maintenance supplied after the appointment can reach veteran pension or disability compensation money in the hands of guardians. In re Bollow's Estate, 223 Wis. 262, 270 N.W. 82, 109 A.L.R. 433. While California, like all other states, denies the claim if it accrued prior to the appointment of a guardian, it is in the group of states which allows the claim if it accrued subsequent to the appointment.

Appellant contends that in the Ferarazza case the court did not consider whether the state was a "creditor" and hence that question should be considered here. While the court did not discuss that question, its determination was necessary to a decision in the case.

2. De Facto Guardian

[4, 5] Appellant contends that from the commitment of the incompetent to it until the appointment of the guardian, it was acting as a guardian de facto, and that as the incompetent's estate is liable for care and maintenance supplied after the appointment of a guardian, it should likewise be held liable for such care and maintenance supplied by a de facto guardian. Appellant relies on In re Guardinaship of Giambastiani, 1 Cal.App.2d 639, 37 P.2d 142. There it was held that a brother's advances and expenditures for his incompetent brother over a period of 11 years prior to his appointment as guardian, including payment of charges of a state hospital for care of the incompetent, were made as a guardian de facto and reimbursement was allowed out of moneys received from the Veterans Administration. It was held that the guardian de facto was not "a creditor" under the exemption statutes, the court saying 1 Cal.App.2d at page 646, 37 P.2d at page 146: "A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, is not the claim of a creditor. It is a charge arising during administration of the ward's affairs and estate, the same as if under a de jure guardianship. Without a previous de jure guardianship, advances made or claims created may not be paid out of funds derived from the veterans' administration. Those properly made by a guardian de jure in course of his administration may not be paid from that source because the funds are only exempted from claims of creditors of the beneficiary soldier. In re Estate of Ferarazza, 219 Cal. 668, 28 P.2d 670." Just what is meant by the last sentence in the above quotation is difficult to understand,[1] but at any rate the court apparently thought its decision was consistent with the Ferarazza case, which it apparently approved. The court found that the de facto guardianship applied not only to the person but to the estate of the incompetent. The brother not only took charge of the incompetent but also managed his property, paid charges and expenses of his property affairs, supported and maintained him chiefly out of the de facto guardian's own private resources. In the case at bar, the evidence, at most, would support only de facto guardianship by the state Department of Mental Hygiene of the person of Bayly (assuming that mere care and custody of an incompetent in a state hospital is sufficient to constitute a de facto guardianship of the person). The department could have been appointed a de jure guardian under section 6660 of the Welfare and Institutions Code, but it was not so appointed. Also the medical superintendent of the state hospital is given certain powers to collect and disperse veterans' pensions under the provisions of section 21 of the World War Veterans' Act of 1924, as amended, 38 U.S.C.A. § 450, but there is no evidence that the medical superintendent exercised such powers here. There is no evidence whatever of any attempt by the state to manage his estate. The cases in jurisdictions in which money received from the government by incompetent veterans is held liable for such veterans' support and maintenance all hold that this applies only after there is a guardian of the estate. Moreover, they seem to be based upon the theory that the guardian, in duty and necessity, is obligated to provide support, care and maintenance of the ward, and in the exercise of such duty contracts with the state for such care and maintenance. While, in a sense, an arbitrary distinction

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But see 37 P.2d 146.

has been drawn between care and maintenance supplied to the incompetent veteran by the state prior to the appointment of a guardian and that supplied subsequent thereto, such a rule is obviously based on the fundamental policy of protecting the incompetent against depletion of his estate by claims accruing before the estate is protected by the watchful eye of a guardian. Having in mind this underlying policy, it is significant that in no state has reimbursement been allowed or provided for care and maintenance provided by the state prior to appointment of a guardian of the estate of the incompetent.

The decree is affirmed.

PETERS, P. J., and WARD, J., concur.

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95 Cal.App.2d 204

JACKSON v. PACIFIC GAS & ELECTRIC CO.

Civ. 7660.

District Court of Appeal, Third District, California.

Dec. 20, 1949.

Rehearing Denied Jan. 18, 1950.

Hearing Denied Feb. 16, 1950.

Fred H. Jackson brought action against the Pacific Gas & Electric Company, a corporation, to recover for injuries received when a derrick attached to a truck in which plaintiff was riding, came in contact with high-power electric wires maintained by defendant, causing electricity to pass through plaintiff's body.

The Superior Court of Shasta County, Albert F. Ross, J., rendered a judgment against plaintiff pursuant to an order sustaining a demurrer to the second amended complaint of plaintiff without leave to amend the pleading, and rendered an order refusing to permit the filing of a third amended complaint, and the plaintiff appealed.

The District Court of Appeal, Thompson, J., reversed the orders and judgment and held that plaintiff should have been permitted to file third amended complaint, to indicate that the Industrial Accident Commission did not have jurisdiction.

1. Appeal and error 🔑102

An appeal lies from an order sustaining a demurrer to a complaint without leave to amend, even though no request to amend complaint was made. Code Civ. Proc. § 472c.

2. Workmen's compensation 🔑2124

In action for injuries, original complaint which alleged that plaintiff was, in effect, an employee of defendant, failed to state a valid cause of action, since it indicated that plaintiff's exclusive remedy was under the Compensation Act. Labor Code, § 3601.

3. Workmen's compensation 🔑2141

Question of relationship of parties as employer and employee, so as to preclude a tort action and make the remedy under the Compensation Act exclusive, is ordinarily one of fact to be determined by the court from the evidence. Labor Code, § 3601.

4. Workmen's compensation 🔑2090

If an employee is injured in performance of services which are not compensable under the Compensation Act, he may maintain an action for the tort independently of the Compensation Act. Labor Code, § 3601.

5. Pleading 🔑34(1)

Pleadings and amendments thereto should be liberally allowed and construed with the object of affording every litigant his day in court and to render substantial justice between the parties.

6. Workmen's compensation 🔑2131

In action for injuries, court erred in refusing to permit plaintiff to file an amended complaint alleging facts showing that Industrial Accident Commission did not have jurisdiction on ground that plaintiff's exclusive remedy was under the compensation Act, though plaintiff in original complaint inadvertently alleged that he was an employee of the defendant, where plaintiff's memory was defective because of injuries. Code Civ.Proc. §§ 472, 473; Labor Code, §§ 3601, 3706.

7. Pleading 🔑216(2), 360(3)

Where a demurrer or motion is made to strike out a pleading on ground that amended pleading does not change the original one or that it is frivolous or sham, court may consider the original pleading to determine that matter.

8. Evidence 🔑208(6)

Abandoned and substituted pleadings may be considered only for limited purposes, but not to bind pleader to an untrue and erroneous admission against interest, which was inadvertently contained therein, but which was subsequently disavowed and corrected in an amended pleading filed by leave of court, in which, or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Code Civ.Proc. § 473.

9. Pleading 🔑230

Court should exercise great liberality in applying statute providing that court may in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party, or a mistake in any other respect, if the amendment contains or is accompanied by satisfactory explanation of how erroneous statements in pleading occurred. Code Civ.Proc. § 473.

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L. C. Smith, Redding Pugh & Pugh and Wm. H. Stoffers, Red Bluff, for appellant.

Robert H. Gerdes, John J. Briare, and W. R. Dunn, San Francisco, Carr & Kennedy, Redding, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against him pursuant to an order sustaining a demurrer to the second amended complaint without leave to amend the pleading, and from an order refusing to permit the filing of a third amended complaint, application for which was made, upon due notice, under Section 473 of the Code of Civil Procedure.

This is a suit for damages for personal injuries received by plaintiff when a derrick attached to a truck upon which plaintiff was riding came in contact with the high-power electric wires maintained by the defendant. Plaintiff was seriously injured by the electricity which passed through his body. The original complaint inadvertently alleged that plaintiff was employed by and under the supervision and control of defendant, thus barring him from maintaining this action, since the Workmen's Compensation Act, Labor Code, sec. 3601, provides for the exclusive remedy when the relationship of employer and employee exists between the parties. Before the defendant made an appearance plaintiff filed an amended complaint under Section 472 of the Code of Civil Procedure, omitting all reference to his employment by the defendant. To that complaint the defendant filed a demurrer which was sustained with permission to amend the pleading. Plaintiff filed a second amended complaint in which he alleged that, at the time of the accident he was "the employee of E. B. Bishop Company", but that, pursuant to a contract between that company and the defendant, the employees of the Bishop Company were "acting under the immediate direction, supervision and control of defendant", and that plaintiff was injured through the negligence of Frank Gerhard who was operating the truck with the attached crawler-crane, upon which plaintiff was riding at the time of the accident. A demurrer to that complaint was sustained *without leave to amend the pleading.* In sustaining that demurrer without leave to amend, the court asserted that it had a right to consider the allegations of the original complaint which contained a statement against interest with regard to plaintiff's employment, which he would not be permitted to contradict in the amended pleading and which previous statement precluded him from maintaining this action. In effect, the court held that the plaintiff was bound by his inadvertent statement against interest in his original complaint, regardless of his effort to correct the alleged mistake and to explain the reasons therefor in an amended pleading.

The plaintiff then moved, upon due notice, under Section 473 of the Code of Civil Procedure, to modify and set aside the last order sustaining the demurrer without leave to amend, and to permit him to file a third amended complaint, a copy of which was attached to the notice of motion. That proposed verified amended complaint was presented at the hearing and is endorsed, "Filed July 19, 1948." Upon hearing, the court denied the motion to modify the last order sustaining the demurrer to the second amended complaint, and denied the application to file the proposed third amended complaint, on the stated ground that "plaintiff did plead himself out of court" in his various attempts to amend his complaint. From the judgment sustaining the demurrer to the second amended complaint and denying the application to file a third amended complaint the plaintiff has appealed as previously stated.

The appellant contends that the second amended complaint states a valid cause of action, and that the court erred in sustaining the demurrer thereto, especially without leave to amend the pleading, and that the court abused its discretion in denying his application under Section 473 of the Code of Civil Procedure for modification of the judgment sustaining the demurrer and denying him permission to file the third amended complaint.

[1] An appeal lies from an order sustaining a demurrer without leave to amend, even though "no request to amend such pleading was made." Code of Civil Procedure, sec. 472c; MacIsaac v. Pozzo, 26 Cal.2d 809, 816, 161 P.2d 449.

[2] The original complaint clearly failed to state a valid cause of action for the reason that it stated that, at the time of the accident, the plaintiff was, in effect, an employee of the defendant. It is true that when an employee of the defendant sustains injuries in the course of his employment which is compensable under the Workmen's Compensation Act, that act provides his exclusive remedy, and he may not maintain an action for the tort in any other tribunal. Fitzpatrick v. Fidelity and Casualty Co. of New York, 7 Cal.2d 230, 60 P.2d 276; Wessell v. Barrett, 62 Cal. App.2d 374, 144 P.2d 656; 27 Cal.Jur. 262, sec. 8; Labor Code, sec. 3601.

There is an exception to the foregoing rule. If the employer "fails to *secure* the payment of compensation" for such injuries, the claimant may maintain an action for the tort independently of the Workmen's Compensation Act. Section 3706 provides that: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this division did not apply."

[3, 4] The question of the relationship of the parties as employer and employee is ordinarily one of fact to be determined by the court from the evidence. An employee may be working in a dual capacity. If he is injured in the performance of services which are not compensable under the Workmen's Compensation Act, he may maintain an action for the tort independently of that act. Crockett v. Industrial Accident Commission, 190 Cal. 583, 213 P. 969; Wessell v. Barrett, 62 Cal.App.2d 374, 376, 144 P.2d 656; 27 Cal.Jur. 314, sec. 44. If the plaintiff was an employee of the Bishop Company and not an employee of the defendant, and he was not injured in the course of any employment by the defendant, we assume he would have the right to maintain this action independently of the Workmen's Compensation Act. In the proposed third amended complaint the plaintiff clearly attempted to allege facts which do not give the Industrial Accident Commission jurisdiction. If that complaint fails to do so then we concede that the court properly denied him leave to file that complaint. But we think that pleading as it stands does not confer jurisdiction on the Industrial Accident Commission.

[5] It is a well-established principle that pleadings and amendments thereto should be liberally allowed and construed with the object to afford every litigant his day in court and to render substantial justice between the parties. LeCyr v. Dow, 30 Cal.App.2d 457, 462, 86 P.2d 900; Roland v. Kreyenhagen, 18 Cal. 455, 457; 21 Cal.Jur. 53, sec. 30.

[6] We are of the opinion the court abused its discretion in sustaining the demurrer to the second amended complaint without leave to amend the pleading, and in denying plaintiff the privilege of filing his proposed third amended complaint.

[7] We think the court erred in assuming upon demurrer to the second amended complaint that it had a right to consider the allegations of the original complaint to the effect that plaintiff was an employee of the defendant, and to determine his relationship in that respect by reference thereto on the theory that he was bound by that statement, when in fact that statement was withdrawn and abandoned by the filing of the amended complaints which superseded the original complaint. It is true that under certain circumstances a court may consider a pleading in the records to which an amended pleading has been filed. For instance, when a demurrer or motion to strike out a pleading on the ground that the amended pleading does not change the original one or that it is frivolous or sham the court may consider the original pleading to determine that matter. Neal v. Bank of America National Trust and Savings Ass'n., 93 Cal.App.2d 678, 209 P.2d 825.

The province and purpose of the law is to ascertain the real facts and to administer justice in the light of such facts. It would seem to be a travesty on justice if a litigant had inadvertently, ignorantly and erroneously stated as a fact, without fault on his part, an admission against interest, if he were to become bound thereby and would not be permitted upon proper showing to correct the innocent error and assert the true fact in that regard. We do not concede that is the law. It has been held that when an original pleading contained an admission against interest, the filing of an amended pleading superseded the original one and that the original pleading could not be used as evidence or be considered by the court. Ralphs v. Hensler, 114 Cal. 196, 45 P. 1062; Miles v. Woodward, 115 Cal. 308, 316, 46 P. 1076; 49 C.J. 558, sec. 773; 41 Am.Jur. 507, sec. 313.

In the Ralphs case, supra, a judgment for plaintiff was reversed on appeal because the court admitted in evidence an original answer containing an admission against interest which had been superseded by an amended answer. The Supreme Court said [114 Cal. 196, 45 P. 1063]: "* * * The amended answer of defendant filed in pursuance of the leave of court thus obtained was an answer which omitted all of the averments which the defendant had theretofore solemnly made, and which this court had held to amount to a ratification."

Quoting with approval from Mecham v. McKay, 37 Cal. 154, the Supreme Court further said: "It was early held * * * that an original pleading containing an admission against interest, which original pleading had been superseded by an amended pleading, could not be admitted in evidence against the pleader, and it was said: *'If the party amends his pleading stating the facts differently he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading.'* "

That court concluded the opinion by stating that:

"* * * Under the rule as thus laid down defendants' answer containing the admissions amounting to a ratification *was superseded and ceased to be a subsisting pleading. Its declarations could not have been received or considered by the court.*" (Italics added.)

Likewise, the text in 41 American Jurisprudence, supra, which is amply supported by authorities in many jurisdictions, says in that regard: "An amended pleading which is complete in itself and does not refer to or adopt a former pleading as a part of it supersedes the former pleading. The original pleading is abandoned by the amendment and is no longer a part of the pleader's averments against his adversary, and the plaintiff cannot avail himself of the allegations contained in the superseded pleading."

The respondent contends that a party is bound by his allegation against interest contained in a pleading, and may not be permitted to alter, abandon or omit that statement in an amended pleading so as to avoid the effect thereof. In support of that statement several authorities are cited. Those cases, however, are distinguishable from the present action.

In Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768, 773, the court said: "A party will not be permitted to disprove admissions in his pleadings." That statement applied only to subsisting pleadings which remained in force, not to untrue and erroneous statements which have been disavowed and corrected in an amended pleading substituted for the original one. In support of the above quoted statement, the Rhode case cites Driver v. International Air Race Ass'n., 54 Cal.App.2d 614, 620, 129 P.2d 771, 774. In the Driver case the court likewise said that, "a party cannot disprove admissions of his pleading." That statement referred only to defendant's effort at the trial to disprove an admission against interest contained in his subsisting answer on file in that case. It did not apply to inadvertent admissions made in a former pleading which became functus officio and ineffectual by the correction of the mistake in an amended pleading filed by leave of court.

The other cases cited by respondent on that subject are likewise distinguishable. The case of N. H. Development Company v. California Lands, Inc., Cal.App., 176 P.2d 755, 759, which was cited by respondent, is not authority in support of its contention in that regard. A hearing was granted by the Supreme Court in that case, and the appeal was subsequently dismissed. Moreover, in that case it was properly held there was no abuse of discretion in sustaining a demurrer to a second amended complaint *without leave to amend,* for the reason that both the former complaint *and the second amended one* alleged an admission against interest, in the form of an "authorization" which defeated plaintiff's cause of action. The Appellate Court said in that regard: "* * * the 'Authorization,' which had been pleaded in the original complaint, *and was also set up in the third and ninth counts of the second amended complaint* as having been executed by plaintiff, authorized defendants * * * to operate the Rancho until all of the secured indebtedness had been paid." (Italics added.)

It thus appears that it was not necessary to resort to the former complaint to determine that plaintiff had formally waived his right to recover in that action, by the terms of his written "authorization". The same authorization and waiver was also "set up" in the second amended complaint to which the demurrer was sustained.

[8] We think the correct rule with respect to reference to former pleadings which have been substituted by amended pleadings filed by leave of court is that the abandoned and substituted pleadings may be considered only for certain limited purposes, but not to bind the pleader to an untrue and erroneous admission against interest which was inadvertently contained therein, but which has been subsequently disavowed and corrected in an amended pleading filed by leave of court, in which or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Otherwise, it would be useless and futile to correct an innocent mistake of fact by stating the truth with respect thereto and explaining the cause of the erroneous statement. The primary function of our courts of justice is to ascertain the truth and real facts of a case and to administer justice accordingly. If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct the false by substituting the true facts, they would become partisans to miscarriages of justice. Our courts not only permit, but strive to elicit, the true facts of all cases, and to render justice by applying the law to such facts. That is the purpose and spirit of the provisions of Section 473 of the Code of Civil Procedure, which reads in part: "The court may, in furtherance of justice, * * * allow a party to amend any pleading * * * by correcting a mistake in the name of a party, *or a mistake in any other respect;* * * *." (Italics added.)

[9] It has been frequently held that courts should exercise great liberality in applying that section and in allowing such amendments. The latest declarations of our Supreme Court and the District Courts

of Appeal recognize that requirement upon condition only that the amendments shall contain or be accompanied by satisfactory explanation of how the erroneous statements occurred. County of Los Angeles v. Lewis, 179 Cal. 398, 400, 177 p. 154; Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 331, 127 P.2d 551; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227; LeCyr v. Dow, supra, 30 Cal. App.2d at page 461, 86 P.2d at page 902; Neal v. Bank of America, supra; Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 724, 161 P.2d 677; 21 Cal.Jur. 183, secs. 127, 128. In the Wennerholm case, in which an order sustaining a demurrer to the fifth amended complaint without leave to amend that pleading was reversed on appeal, the Supreme Court said [20 Cal.2d 713, 128 P. 2d 525]: "It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading."

In the present case plaintiff's motion under Section 473 of the Code of Civil Procedure to file his proposed third amended complaint, a copy of which was attached to the notice of motion, should have been granted, in spite of the fact that it may have been subject to demurrer for uncertainty or other defects in form.

The proposed third amended complaint definitely alleges that "At all times herein referred to, plaintiff was working as the employee of E. B. Bishop Company." All that it states is that one Frank Gerhard, who was operating the crane-crawler upon which plaintiff was injured, was under the "direction, supervision and control" of the defendant. With relation to the required explanation of the erroneous statements against interest which were included in the former complaints, the proposed third amended complaint states that such incorrect statements "were based upon erroneous and mistaken information relative to the matters referred to therein", as follows: [Here follow three paragraphs definitely stating that the erroneous allegations were those which plaintiff desires to correct and abandon.] As excuse or explanation for including those erroneous statements in the former pleadings, the plaintiff alleges: "That at the time of drafting and filing said original complaint [by his attorney] the plaintiff's condition of memory was such as to make it very difficult for him to give his counsel a complete and accurate statement of the circumstances surrounding his injury or preceding it. Counsel for plaintiff were, therefore, required to assemble the facts as best they could from the limited sources of information available."

It appears that plaintiff was seriously and permanently injured as a result of the derrick coming in contact with the high-power lines of defendant, and that he was confined in a hospital, and therefore mentally incapable of disclosing the true facts to his attorneys.

The proposed third amended complaint then proceeds to recite how counsel later acquired his knowledge of the true facts with relation to the nature of plaintiff's employment. The pleading alleges that the attorneys afterward secured a copy of a written agreement, dated March 15, 1946, from defendant's San Francisco office, and from a transcript of evidence taken at the coroner's inquest of another person who was electrocuted in that same transaction, showing conclusively that "plaintiff was at all times mentioned in the complaint an employee of the E. B. Bishop Company *and not an employee of defendant* Pacific Gas & Electric Company." (Italics added.)

It thus appears that plaintiff was employed by the Bishop Company, and that he was injured while riding on a truck carrying a crawler-crane, which was being operated by Frank Gerhard *who was employed and under the control of the defendant,* not the Bishop Company. But it is not alleged what relationship Gerhard sustained to the Bishop Company. Nor is it alleged that the Bishop Company was under the direction and control of the defendant. The essential facts to show that indirect relationship are not alleged. That relationship between plaintiff and the defendant is a matter of defense which should be raised by either a demurrer for uncertainty or by answer. We therefore conclude that the court abused its discretion in refusing to permit the third amended complaint to be filed.

The order sustaining the demurrer to the second amended complaint, *without leave to amend* is reversed. The judgment that plaintiff take nothing by this action, and the order refusing to permit him to file his third amended complaint are reversed. The court is directed to grant plaintiff permission to file the proposed third amended complaint.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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95 Cal.App.2d 136

COLE et al. v. RIDINGS et al.

Civ. 16998.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1949.

Rehearing Denied Jan. 5, 1950.

Hearing Denied Feb. 8, 1950.

Leola June Cole, a minor, by her guardian ad litem, and another, sued Ora Lee Ridings, Harry Kirby Smith, Jr., and others for personal injuries sustained by minor plaintiff when struck by a motorcycle operated by defendant Smith.

From a judgment of the Superior Court of Los Angeles County, Joseph M. Maltby, J., on a jury's verdict for defendants, plaintiffs appealed.

The District Court of Appeal, Drapeau, J., reversed the judgment, holding that the trial court committed prejudicial errors in giving instructions on presumptions of due care and minor plaintiff's contributory negligence and in refusing an instruction on the last clear chance doctrine.

1. Evidence 🔑87

A disputable presumption is substitute for proof of facts and a species of evidence, which may be accepted and acted on when there is no other evidence to uphold contention for which it stands.

2. Evidence 🔑89

A disputable presumption is dispelled by production of controverting evidence covering subject of presumption. Code Civ. Proc. § 1961.

3. Evidence 🔑53

When there is conflict in evidence introduced by opposing parties, there is no room for disputable presumption.

4. Negligence 🔑138(2)

In personal injury suit, instruction that jury must weigh evidence conflicting with presumption of due care against such presumption and evidence supporting it to determine which preponderates is erroneous, where plaintiffs' evidence discloses injured party's acts and conduct immediately before or at time of accident.

5. Appeal and error 🔑1064(1)

Whether giving of instruction in personal injury suit that jury must weigh evidence conflicting with presumption of due care against such presumption and evidence supporting it to determine which preponderates constitutes prejudicial error, when plaintiffs' evidence discloses injured party's acts and conduct at time of accident, depends on circumstances of case.

6. Appeal and error 🔑1064(1)

In action for injuries to minor struck by motorcycle operated by defendant, instruction that jury must weigh evidence conflicting with presumption of due care against such presumption and evidence supporting it to determine which preponderates was error prejudicial to plaintiffs, in view of conflicting testimony as to minor's contributory negligence and erroneous instructions as to her duty to yield right of way to motorcycle. Vehicle Code, § 562 (a, b).

7. Automobiles 🔑246(35)

In action for injuries to minor struck by motorcycle operated by defendant, instructions to jury as to duty of pedestrian, crossing roadway elsewhere than within crosswalk, to yield right of way to vehicles, were erroneous in failing to inform jury clearly that such duty of plaintiff was not absolute and that real question was whether she exercised reasonable care required of minor under existing circumstances. Vehicle Code, § 562(a).

8. Automobiles 🔑245(74)

Whether ten year old girl, struck by motorcycle while crossing street between intersections, was contributorily negligent in failing to yield right of way to motorcycle or observe traffic conditions was fact issue for jury on conflicting evidence as to minor's and motorcyclist's negligence. Vehicle Code, § 562(a, b).

9. Appeal and error 🔑930(1)

In determining whether jury's verdict was supported by evidence, appellate court must assume that jury accepted view most favorable to respondent.

10. Appeal and error 🔑928(1)

In determining whether trial court's instructions to jury were correct, appellate court must assume that jury might have believed evidence on which instruction favorable to appellant was predicated and rendered verdict for appellant had correct instruction on subject been given.

11. Appeal and error 🔑1064(1)

In action for injuries to minor struck by motorcycle operated by defendant, erroneous instructions, failing to inform jury clearly that plaintiff's stated duty to yield right of way to motorcycle between street intersections was not absolute and that real question was whether plaintiff exercised reasonable care required of minor under existing circumstances, were prejudicial to plaintiffs, in view of conflicting evidence on issues of minor plaintiff's and defendant's negligence. Vehicle Code, § 562(a, b).

12. Automobiles 🔑245(91)

Whether operator of three wheeled motorcycle saw a minor girl, crossing street between intersections, in time to avoid striking her, in exercise of ordinary care, after he realized or should have realized that she was unaware of her perilous position, was question for jury on conflicting evidence.

13. Automobiles 🔑244(59)

In action for injuries to pedestrian struck by motor vehicle operated by defendant, last clear chance doctrine may be invoked and applied, though there is no positive testimony that defendant actually knew of plaintiff's danger and defendant definitely denies having seen plaintiff before collision, where facts and circumstances in evidence justify jury finding that defendant was actually aware of plaintiff's danger in time to avert accident.

14. Appeal and error 🔑1067
Automobiles 🔑246(58)

In action for injuries to minor struck by motorcycle operated by defendant, where evidence raised question for jury as to whether defendant saw minor plaintiff in time to avoid accident, in exercise of ordinary care, after he realized or should have realized that such plaintiff was unaware of her perilous position, trial court's refusal to instruct jury on last clear chance doctrine was error prejudicial to plaintiffs.

15. Trial 🔑203(1)

Each party to action is entitled to have his theory of case go to jury, and requested instructions, proper in form and substance, should not be refused merely because trial court does not accept theory on which party requesting such instructions relies.

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Preston W. Johnson, Long Beach, Henry F. Walker, Los Angeles, of counsel, for appellants.

Forrest A. Betts, Los Angeles, Gerald F. Smith, Jr., Los Angeles, of counsel, for respondents.

DRAPEAU, Justice.

This is an appeal by plaintiffs from a judgment entered on the verdict in favor of defendants. The action is for damages for personal injuries sustained by the minor plaintiff in a collision between her and a motorcycle operated by defendant Smith. The minor plaintiff will be referred to herein as appellant.

Both sides concede that the evidence although highly conflicting would support a verdict and judgment either way on the issues of negligence and contributory negligence. However, appellant maintains that the court committed prejudicial error in instructions given and refused, particularly in view of the closeness of the question whether there was contributory negligence on the part of appellant.

The accident occurred at 4:30 p. m. of June 25, 1947, a dry, clear day, in the city of Long Beach on Temple Street about 100 feet north of its intersection with 8th Street, both streets having a width of 36 feet.

Appellant Leola June Cole, aged ten years, was visiting her grandmother, who lived in the second house north of said intersection on the east side of Temple Street. An ice-cream vendor traveling south on Temple Street stopped his truck directly across the street from the grandmother's house. Appellant and three small companions crossed the street and waited in line with other children at the back of the truck to buy ice-cream. While so waiting, the grandmother of appellant came to her front door and seeing the child near the truck, called to ask if she needed any money. Appellant looked in both directions and started toward her grandmother. She testified that when she looked south toward 8th Street she saw nothing on Temple Street between her and the corner, but she had a recollection that an automobile on 8th Street was then crossing the intersection. While walking across Temple Street and before she reached the east curb thereof, she was struck and rendered unconscious by a motorcycle operated by respondent Smith.

Respondent Smith, in the course of his employment of a pick up and delivery service for Riding Motors, had delivered a Cadillac car and was on his way back to his employers' garage driving a three-wheel Harley Davidson motorcycle north on Temple Street. As he approached the intersection of that street with 8th Street, an automobile traveling east on 8th Street passed through the intersection ahead of him; he shifted gears and crossed the intersection observing for the first time that an ice-cream truck was standing about 100 feet away, facing south on the west side of Temple Street. He saw no people about the truck, until the front of his motorcycle was about even with the front end thereof, when he saw appellant for the first time; he was then 18 to 20 feet away from her and was driving at a speed of 15 to 20 miles per hour. This witness testified that appellant was facing away from him and was 3 to 4 feet west of the center line of Temple Street; that she went about 8 feet from the time he first saw her until the impact, which was a point 3 to 4 feet east of the center line of Temple Street and about 15 feet west of the east curb thereof; that he swerved to the left to avoid appellant, but she came in contact with the right front shield or right front handlebar of the motorcycle and threw it out of control. That only a second of time elapsed from the time he first saw her and the impact and that he applied his brakes without success just before the impact. He testified that the little girl "darted right out in front of the motorcycle * * * From behind the ice cream truck. * * * Running * * * At the time she darted out she was facing the front of her grandmother's house in a northeasterly direction and then just before the impact she turned and looked at me. * * * She paused just a very little * * * Right in front of the motorcycle."

The grandmother testified that the child was four or five feet behind the ice cream truck; that she glanced both ways as she left the truck and walked toward her across the street.

The driver of the truck testified he heard a woman's voice call out whereupon appellant "ran out from the group of children into the street * * * she ran * * * was running when she started out"; that he glanced back to his truck after she left and glanced up again just in time to see the motorcycle hit her; that she was carried about 15 feet; that the motorcycle traveled about 45 or 50 feet after the impact and knocked over another motorcycle parked at the curb on the east side of the street.

The place of the collision was in a residential district, there being no marked crosswalks or traffic signals at the intersection. Apellant suffered severe injuries.

It is urged that prejudicial error was committed in giving the instruction re presumption of due care, to-wit: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there *is* other evidence that *conflicts* with such a presumption, it is the jury's duty to weigh that evidence against the presumption, and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, by instructions on the burden of proof." (Emphasis included.)

It is argued that in the circumstances presented herein, the jury might well have found the evidence of respondents' negligence to preponderate had the instruction not been given; but faced with requirement laid down therein, the jury apparently concluded that the evidence of negligence, although sufficient to preponderate over conflicting evidence, was insufficient to preponderate over such conflicting evidence plus the presumption of due care.

[1-3] In Clary v. Lindley, 30 Cal.App.2d 571, 573, 86 P.2d 920, 921, the following appears:

"'A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.' Noble v. Key System, Ltd., 10 Cal.App.2d 132, 137, 51 P.2d 887, 889. It may be controverted by evidence. Code Civ.Proc., § 1961. It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption (Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914), for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption. (Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65)."

[4] In Barker v. City of Los Angeles, 57 Cal.App.2d 742, 749, 135 P.2d 573, 577, the court discussed an instruction similar to that here under review, to-wit: "From apparently conflicting opinions of appellate courts of California, the following rules may be adduced:

"(1) It is error for the trial court to give an instruction such as that set forth above where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time of the accident. (Speck v. Sarver, 20 Cal.2d 585, 587, 588, 128 P.2d 16; Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 491, 82 P.2d 720.)

[5] "(2) Whether the giving of such an instruction when the evidence of the plaintiff discloses the acts and conduct of the injured party at the time of the accident constitutes *prejudicial error* depends on the circumstances of each case. (Speck v. Sarver, supra.)"

[6] Applying the above rules to the instant cause, it was prejudicial error for the trial court to give the instruction on the presumption of due care, when considered in conjunction with the conflicting testimony which formed the basis of the jury's decision and also with other alleged erroneous instructions hereinafter discussed.

It is conceded by both sides that the court correctly instructed the jury on the conduct required of a minor, to-wit:

"A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for her actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Leola June Cole, and whether her conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances."

[7] However, appellants maintain that the court erroneously instructed the jury to the effect (1) that under sec. 562(a), Vehicle Code, every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles upon the roadway; (2) that if a pedestrian crosses other than within a marked or unmarked crosswalk at an intersection, the law requires the pedestrian to yield the right of way to all vehicles upon the roadway so near as to constitute an immediate hazard; (3) that "Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting her, to look to that vicinity from which, were a vehicle approaching, it would immediately endanger her passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing."

It is argued that by these instructions the jury was told as a matter of law that if the minor failed to yield the right of way or failed to observe traffic conditions, she was guilty of contributory negligence; and thus that they invaded the province of the jury, were in conflict with the correctly given instruction on the standard of care required of a minor, and were misleading as guides to the jury in its determination of questions of fact. Also, that the first of such instructions as given incompletely and incorrectly stated the law thereby placing a greater burden on the minor than is required of an adult and gave respondent driver an absolute right where none existed: i. e., the court did not include in the instruction subdivision (b) of section 562, Vehicle Code, which reads: "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

While the duty to yield the right of way imposed on a pedestrian by section 562, supra, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised and not merely whether or not the right of way has been actually yielded. These instructions emphasized the duty of appellant to yield the right of way and failed to inform the jury clearly that such duty was not absolute and that the real question was whether appellant exercised reasonable care under the circumstances then and there existing, to-wit: that degree of care required of a minor under like circumstances. See Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60.

[8] This is a very close case on its facts, particularly on the issue of negligence of the participants. It should be noted that there is some evidence of contributory negligence on the part of appellant, but it can hardly be said that the record shows contributory negligence as a matter of law; that was an issue of fact for the jury. It cannot be assumed under the circumstances of this case that the jury's verdict for respondents was based on the evidence of contributory negligence alone; it may well have been predicated upon a theory of defense permitted by one or more of the erroneous instructions discussed above. Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 23, 156 A.L.R. 1221; citing O'Meara v. Swortfiguer, 191 Cal. 12, 15, 214 P. 975, in which it is stated:

[9, 10] "It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party."

[11] Likewise in the case here under review. Therefore it was prejudicial error to give the instructions complained of.

It is finally contended that the trial court erred in refusing to instruct the jury on the doctrine of the last clear chance.

The instruction requested by appellants recited that the doctrine might be invoked if the following six elements were present in the evidence:

1. That plaintiff by his own negligence got himself into a position of danger;

2. That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position;

3. That the defendant had actual knowledge of plaintiff's perilous situation;

4. That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care;

5. That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care;

6. That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

Respondents concede the existence of the first four elements but dispute the applicability of the doctrine, urging that the fifth and sixth elements were not established because of an absolute failure to show that it was physically possible for even an exceptionally skilled individual to stop the three-wheel motorcycle within 18 to 20 feet.

As a matter of fact, police officer Hyatt riding a three-wheel Harley Davidson motorcycle made some tests at the place of the collision a few days before the instant trial, and testified that traveling at speeds of 15, 20 and 25 miles per hour, he was able to stop his vehicle in 10, 15 and 18 feet respectively.

[12] It is shown by the record that when appellant started to cross the street, she looked but saw nothing between her and the intersection; that she saw an automobile crossing the intersection on 8th Street. Respondent shifted gears and crossed the intersection after an automobile traveling east on 8th Street passed in front of him. Respondent was then 100 feet south of the ice cream truck.

From this evidence the jury could have found that respondent was from 90 to 100 feet from appellant when he first saw her walking diagonally across Temple Street with her back to him.

Again, there was testimony that appellant was four or five feet behind the truck when she started to cross the street; that the truck was 18 to 22 feet long, and that respondent admitted seeing appellant when the front end of his motorcycle was about even with the front end of the truck. Under this view, the jury could have found that appellant was 26 or 27 feet distant when respondent first saw her, and that by the exercise of ordinary care he could have avoided hitting her, i. e., by merely slowing his vehicle.

It was for the jury to determine under the circumstances whether respondent saw appellant prior to the time he said he did and in time to have avoided the accident in the exercise of ordinary care after he realized or ought to have realized that she was unaware of her perilous position.

[13] As stated in the late case of Haerdter v. Johnson, 92 Cal.App.2d 547, 207 P.2d 855, 857: "There is abundant authority that 'notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the *facts and circumstances* are such as *would justify the jury in finding that* despite the defendant's denial of knowledge or the absence of direct testimony on the subject, *he was actually aware of plaintiff's danger in time to* avert the accident; in other words, that he "must have known" of plaintiff's danger.' (Emphasis added.) Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 442, 136 P.2d 611, 615, second Gillette appeal; see prior appeal, 41 Cal.App.2d 758, 107 P.2d 627; Accord * * *."

[14, 15] In the circumstances, it was prejudicial error to refuse to instruct the

jury on the doctrine of the last clear chance, because "It is settled law that each party is entitled to have his theory of the case go to the jury, and requested instructions, which are proper in form and substance, should not be refused, merely because the trial court does not accept the theory upon which a party relies." Kelley v. City and County of San Fancisco, 58 Cal. App.2d 872, 876, 137 P.2d 719, 721.

The judgment is reversed.

WHITE, P. J. and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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95 Cal.App.2d 306

MURPHY et al. v. MUNSON.

Civ. 7688.

District Court of Appeal, Third District, California.

Dec. 22, 1949.

Lorenzo Murphy and others, doing business under the name and style of A. I. Young Machinery Company, sued W. H. Munson, doing business under the name and style of Munson Lumber Company, to recover purchase price of a portable sawmill and equipment the delivery of which defendant refused to accept.

A judgment was entered for defendant by the Superior Court, Siskiyou County, James M. Allen, J., and the plaintiffs appealed.

The District Court of Appeal, Thompson, J., reversed the judgment on ground that defendant not only ratified the agreement to purchase the machinery but was estopped from denying that one who signed agreement was without authority to order the machinery in his behalf.

1. Witnesses 🔑268(3)

In action to recover purchase price of portable sawmill equipment, where defendant testified on his examination in chief that he did not sign any of letters allegedly constituting the contract, plaintiffs had right on cross-examination to prove by defendant, that contract to buy machinery was valid because defendant authorized his employee to sign his name to the letters.

2. Frauds, statute of 🔑116

Where defendant's signatures to letters allegedly constituting contract to purchase portable sawmill and equipment were signed by his employee by his direct authorization, the contract fully met requirements of statute of frauds. Civ.Code, § 1624a.

3. Frauds, statute of 🔑83

Where there was evidence that alterations and changes made in the standard portable sawmill machine at buyer's request rendered it unsalable to others in ordinary course of seller's business, provisions of statute of frauds was not applicable to the sales contract. Civ.Code, § 1624a.

4. Frauds, statute of 🔑116(3)

Where defendant's employee placed defendant's signatures on letters allegedly constituting contract to purchase portable sawmill machine and equipment as a mere amanuensis and contract purported to be defendant's personal contract, defendant's authorization for employee to sign his name to the letters was not required to be in writing. Civ.Code, § 2309.

5. Sales 🔑32

Where employee signed defendant's signatures to letters allegedly constituting contract to purchase portable sawmill machine and equipment as a mere amanuensis, and contract purported to be defendant's personal contract, defendant's signature to the letters was not invalid merely because defendant was not personally present when signature was actually subscribed to the letters. Civ.Code, § 2309.

6. Principal and agent 🔑137(1)

Where buyer had full knowledge of ordering of portable sawmill machine and equipment, and he thereafter made request for alterations and procuring of parts which rendered machine unsalable to other buyers in ordinary course of seller's business, buyer, even though he thought that his employee had signed his own name to the agreement to buy machinery, not only ratified the agreement but was estopped from denying that his employee was without authority to order machinery in his behalf. Civ.Code, §§ 1624a, 2309.

◆

Barr & Hammond, by J. Everett Barr, Yreka, Jack K. Berman, San Francisco, for appellants.

Mark M. Brawman, Yreka, for respondent.

THOMPSON, Justice.

This is a suit to recover the purchase price of a portable sawmill and equipment sold to defendant for the agreed price of $4,207.14 and the delivery of which the purchaser refused to accept. The answer denied the material allegations of the complaint and pleaded, as a further defense the statute of frauds. Civil Code, sec. 1624a. The agreement to purchase the sawmill was in writing, which was signed in defendant's name by his amanuensis, at his request. It was in the form of a letter, the terms of which were dictated to defendant's clerk, Mr. Miller, who took memoranda of the terms and order for the machine, and subsequently wrote them out on one of defendant's printed letterheads and signed defendant's name to it as he had been requested to do.

In an amendment to the complaint the plaintiffs pleaded equitable estoppel. At the written request of the defendant, the standard machine which was ordered was altered, to the detriment of plaintiffs, and new parts were purchased and installed at a cost of $525. The court adopted findings favorable to the defendant, and judgment was rendered that plaintiffs take nothing by this action. From that judgment this appeal was perfected.

The vital questions to be determined on this appeal are whether the findings and judgment are supported by the evidence, whether the defendant authorized his clerk to order the machine in his name, and whether the conduct of the defendant estopped him from denying that he contracted to purchase the machine.

We are of the opinion the essential findings and judgment are not supported by the evidence. The uncontradicted evidence clearly indicates that the defendant not only contracted in writing to purchase the portable sawmill in question, but he confirmed and ratified that contract by letters which he subsequently sent to plaintiffs.

Plaintiffs were engaged in business in northern California under the fictitious name of A. L. Young Machinery Company, with their principal place of business at Fresno. They sold wood-working machines, trucking equipment and portable sawmills, including standard Farquhar Saw Mills and regular equipment therefor. They issued circulars advertising such machinery and equipment together with the prices thereof. John Edward Kelly, who resides at 1252 Portola Drive, San Francisco, was a branch manager of plaintiffs' business and was a material witness at the trial of this case.

The defendant was engaged in the lumber business near Callahan, Siskiyou County, where he lived. He employed James W. Miller as his bookkeeper, secretary and clerk. Most of the time Mr. Miller lived in the home of Mr. Munson. Regarding the letters which constitute the written agreement to purchase the machine in question, it appears that on August 16, 1947, in response to an inquiry from the Munson Lumber Company, the A. L. Young Machinery Company wrote that company a letter to which a circular was attached, advertising the Farquhar Saw Mill and equipment with the selling prices quoted therein. In that letter plaintiffs offered to sell and supply defendant the desired machinery. On August 20th the defendant, Munson, called his clerk, Mr. Miller, into his office and after the reading of the correspondence on that subject he instructed the clerk that "he wanted to order this mill" and certain specified machinery. He had previously instructed his clerk to sign defendant's name to such communications. The clerk testified that he then made a written memorandum, in the presence of the defendant, of the machinery which he was told to order for the defendant. The clerk said that he transcribed the letter, in strict accordance with his instructions, on defendant's printed letterheads on August 20th, to which he signed defendant's name as directed. That letter states, in part, as follows:

"I am hereby placing my order for the saw-mill referred to in your letter of August 16, and as described in the sheet which accompanied the letter, * * *."

It is true that the clerk said with respect to defendant's signature on that particular letter, "I couldn't say whether he told me to sign his name [to that particular letter] or not." But he did say the defendant had given him general instructions to sign his name to such correspondence. In response to the question, "When you started working for him, he told you to sign his name?" to which he replied "Yes". The clerk testified that he had no discretion and that he had nothing to do with determining what machinery should be ordered, or with respect to any of the terms of the contract; that the defendant himself decided all such matters and merely dictated to him, as an amanuensis, the terms and conditions of the agreement and that he merely transcribed the letter from the memoranda which he made, and signed defendant's name thereto, as usual, at his request.

[1] Regarding the authorization of defendant for his clerk to sign his name to that and other letters on that subject, it is significant that the defendant did not testify that he did not authorize the clerk to sign his name. The defendant, Munson, was called as a witness in his own behalf. He did not deny that authorization. His examination in chief was exceedingly brief. It consisted only of the following material testimony: "Q. * * * Have you examined the signatures on each of the exhibits? A. I have. Q. Are those *signatures* your signatures? A. No." Of course he merely meant that his name on those instruments were not in his handwriting. But an inference might be drawn from his answer that he did not authorize anyone to sign his name for him. Certainly the plaintiffs had a right on cross-examination to inquire what the defendant meant by saying those were not his signatures. The laconic answer of defendant raised but avoided an answer to the most important issue in this case as to whether the defendant authorized Mr. Miller to sign his name to the written order for the machinery. On cross-examination plaintiff had a right to prove by the defendant, if possible that the contract to buy the machinery was valid and binding because the defendant authorized his clerk to sign his name to the letters. That was competent and proper cross-examination. But the court erroneously sustained objections to those proper questions on the stated theory that they were not valid or binding because the defendant was not *personally present* when his name was signed to the documents, even though they were otherwise duly authorized. The plaintiffs' attorney then offered to prove that "Mr. Miller affixed his [defendant's] signature at his direction", which offer was improperly denied on the ground that it was not proper cross-examination. The plaintiffs were thereby precluded from cross-examining the defendant on the most important issue of the case. We are satisfied the defendant authorized those signatures. Miller so testified, in effect. The uncontradicted evidence of the case, and the entire conduct of the defendant confirms that conclusion. The rulings of the court on those questions and upon that offer were clearly erroneous.

In defendant's letter to plaintiffs dated August 20th, he requested plaintiffs to make specified alterations and changes in the standard Farquhar Saw Mill as advertised by the addition of "a third headblock and a top-saw rig to carry a 40″ saw to be used in connection with a 60″ bottom saw." Plaintiffs agreed to do so and wrote defendant August 29th saying they had ordered the requested parts at a cost of $525, but suggested the use of a 36″ saw instead of the requested 40″ saw. September 6, 1947, defendant accepted that proposed change of saws and thereby ratified the former agreement of purchase, including his authorization to sign his name thereto. That letter reads:

"Sept. 6, 1947

"Gentlemen:

"We have your letter of August 29 in regard to the top-saw attachment and additional head-block.

"We will use the 36" saw instead of the 40" saw as we first intended and approximately 60 day shipment will be all right as we intend to install the mill this winter.

"Yours very truly
"[Signed] W. H. Munson."

The machine and equipment were crated and ready for shipment, but defendant subsequently refused to accept delivery. This suit was then commenced to recover the agreed purchase price.

[2, 3] The correspondence between the parties in this case clearly constitutes a valid binding agreement for the purchase and sale of the sawmill and equipment in question. The letters from the defendant were written on his own printed letterheads, and his name was signed to each letter. The plaintiffs were led to believe they were dealing directly with the defendant himself. The letters were signed with the defendant's name, by his direct authorization. While that authorization was general and not specific as to each letter, the evidence was adequate to show his authorization. Moreover, he subsequently ratified and approved that agreement to purchase the machinery. If more definite evidence of specific authorization for the signature of the particular letter is deemed to have been required, the plaintiffs were precluded from furnishing it by the erroneous rulings of the court. The signatures of the defendant to those letters, under the circumstances of this case, fully meet the requirements of Section 1624a of the Civil Code and comply with the statute of frauds, for they were signed by "his agent in that behalf." Moreover, that section of the code provides that "if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

There is evidence in this case that the alterations and changes made in the standard machine at defendant's request rendered it unsalable to others in the ordinary course of plaintiffs' business. They testified that they tried to sell the machine as altered, and were unable to do so.

[4] Nor is Section 2309 of the Civil Code, upon which the defendant relies, applicable. The agreement in the form of letters to purchase the machinery was not a delegation of authority on the part of the defendant for his clerk, Mr. Miller, to "*enter into a contract.*" The clerk testified positively that he had no such authority and exercised none; that he had nothing to do with making the contract, or with the determination of the terms thereof. That was done by the defendant himself, who dictated the terms of the contract to his clerk. The order was written on defendant's regular printed letterheads to which his name was signed by his authorization. It purported to be his personal contract. None of the subsequent communications refuted the fact. He affirmed the validity of his order and signature by subsequently modifying some of the terms and by requesting certain changes in the machine and equipment. The agent did not "*enter into* a contract". The scrivener had no discretion in making that agreement to purchase the machinery. That identical question was determined adversely to defendant's contention in Kadota Fig Association of Producers v. Case-Swayne Co., 73 Cal.App.2d 815, 820, 167 P.2d 523, involving the same issues which are presented on this appeal. A hearing in that case was denied by the Supreme Court. In the Kadota case the name of the authorized agent of a surety company on a bond which was prepared by the agent under his personal directions, but not signed by him, was subsequently signed by Judge Shaffer of Merced, in the name and by the request of the agent transmitted from the agent to Judge Shaffer by telephone from another city. The signature and bond were held to be valid and binding on the surety company, although the agent's name was not signed in his presence. Quoting with approval from Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280, this court said:

"The foregoing language applies to the present case, in which there was no attempt to delegate authority to the amanuensis to exercise discretion with respect to the provisions of the bond, but merely to authorize him to sign the agent's name to the document. It is not necessary that such authorization, merely to sign the name of an agent to a surety bond, shall be in writing. A multitude of authorities hold that an oral request to perform the mere mechanical act of signing another person's name to an instrument is valid and binding, even though the instrument is required to be in writing. Section 2309 of the Civil Code provides that:

"'An oral authorization is sufficient for any purpose, except that an authority *to enter into a contract* required by law to be in writing can only be given by an instrument in writing. (Italics added.)'

"The present case does not involve an authorization 'to enter into a contract.' Judge Shaffer was given no authority to enter into the contract of the surety bond. He was merely directed to sign the name of the duly authorized agent of the contracting surety company."

It follows that the mere authorization of the defendant for Mr. Miller to sign his name to the written order for the machinery was not required to be in writing by Section 2309 of the Civil Code, or at all. An oral request of the defendant to have his name signed was perfectly valid, whether the name was signed in or out of his presence.

[5] Regarding the asserted invalidity of the signature of the defendant because he was not actually personally present when the documents were signed, this court said in the case last cited, 73 Cal.App.2d at page 821, 167 P.2d 527:

"* * * But we are cited to no case, and know of no authority which requires that the signature of the party shall be actually made in his presence. We are of the opinion the signature is valid and binding when the authorization to sign the instrument is conveyed directly to the amanuensis by telephone [or otherwise], as it was in this case."

There is no merit in the contention that the signature of the defendant in this case is invalid merely because he was not personally present when it was actually subscribed to the letters. The clerk was authorized to sign defendant's name just as he did in this case. The signature is valid and binding.

[6] We are of the opinion the defendant was estopped from denying the validity of his contract to purchase the machinery by his conduct and by his request for the alterations and procuring of parts, which the plaintiff testified rendered the machine unsalable and unsuitable to other buyers in the ordinary course of the seller's business. The defendant had full knowledge of the ordering of the machinery. He himself dictated the letter ordering the machinery. He directed plaintiffs to make substantial alterations in the standard sawmill, which was done, to plaintiffs' detriment. With full knowledge of the entire transaction and of all communications, even though he thought that the clerk had signed his own name to the agreement, under the circumstances of this case he not only ratified the agreement to purchase the machinery, but he was estopped from denying that his agent was without authority to order the machinery in his behalf. Vanciel v. Kumle, 26 Cal.2d 732, 160 P.2d 802; Ross v. Prudential Guarantee B. & L. Association, 140 Cal.App. 148, 158, 35 P.2d 176; Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323; 2 C.J.S., Agency, p. 1063, § 29 (2) (b).

The judgment is reversed and the court is directed to ascertain the sum due and owing to plaintiffs and to render judgment in their favor for that amount.

ADAMS, P. J., and PEEK, J., concur.

95 Cal.App.2d 118

ALVIS v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASS'N et al.

No. 14130.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1949.

As Corrected on Denial of Rehearing Jan. 14, 1950.

Hearing Denied Feb. 8, 1950.

Dorothy E. Alvis sued the Bank of America National Trust and Savings Association, a national banking association, and another to compel satisfaction of a judgment entered against the life beneficiary of a spendthrift trust out of accumulated income. James Abner Sevier and Robert Melvin Sevier intervened.

The Superior Court of San Mateo County, A. R. Cotton, J., rendered judgment for the plaintiff, and intervenors appealed.

The District Court of Appeal, Ward, J., affirmed the judgment and held that the accumulated income from the trust was surplus income subject to the claims of the creditor.

1. Evidence 🔑43(1)

Courts take judicial notice of official judicial acts of courts of state, at least as limited to proceedings in same matter which are not disputed. Code Civ.Proc. § 1875, subd. 3.

2. Evidence 🔑43(3)

District Court of Appeal would take judicial notice that neither life beneficiary of spendthrift trust nor his family instituted proceedings to compel trustee to pay accumulated income so that such surplus income would be subject to claims of creditor of life beneficiary. Code Civ.Proc. § 1875, subd. 3; Civ.Code, § 859.

3. Trusts 🔑151(1)

"Surplus" within meaning of statute making surplus trust income subject to claims of beneficiary's creditors is determined by the station in life of the beneficiary. Civ.Code, § 859.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Surplus".

4. Trusts 🔑151(2)

Under statute subjecting to claims of beneficiary's creditors, surplus trust income beyond sum necessary for education and support of beneficiary, life beneficiary is entitled to receive free from claims of his creditors sufficient income to support himself and those dependent on him according to the mode of life to which they have been accustomed and to care for any affliction from which he or any of his family may be suffering. Civ.Code, § 859.

5. Trusts 🔑151(3)

Under statute subjecting to claims of beneficiary's creditors surplus income of trust beyond sum necessary for education and support of beneficiary, generally, burden of proving that there is surplus income from trust estate over that necessary for support is on judgment creditor. Civ.Code, § 859.

6. Trusts 🔑151(3)

Finding that accumulated income from spendthrift trust was surplus was not contrary to evidence so that such surplus would be subject to claims of judgment creditor of life beneficiary. Civ.Code, § 859.

7. Trusts 🔑151(3)

Judgment creditor of life beneficiary of spendthrift trust seeking to reach accumulated income of trust had burden of proving that accumulated amount above principal sum of trust was surplus income. Civ.Code, § 859.

8. Trusts 🔑151(2)

The term "surplus" as generally applied to a trust fund is the amount in excess of capital or corpus of the trust.

9. Trusts 🔑151(2)

The term "surplus" as used in statute making surplus income from trust subject to claims of beneficiary's creditors means amount which remains after need for education and support of beneficiary is satisfied. Civ.Code, § 859.

10. Trusts 🔑12

Purpose of a spendthrift trust is to assist a beneficiary who is presumed incapable of wisely directing his own financial affairs.

Paul E. Sloane, Athearn, Chandler & Farmer, Hoffman & Angell, Philip H. Angell, Reginald G. Hearn, San Francisco, for appellants.

Bullock, Wagstaffe & Daba, Redwood City, for respondents.

WARD, Justice.

This is an appeal by the intervening remaindermen from a judgment entered in the Superior Court of San Mateo County against defendant trustee in the sum of $3,121.91 and in favor of plaintiff, a judgment creditor of the beneficiary of a spendthrift trust. The interveners are the two sons of the beneficiary.

The case was tried on an agreed statement of facts. Briefly, they are as follows: Ida Henderson Sevier on March 20, 1930, created an inter vivos trust, to which amendments were made in 1932, 1938 and 1940, providing that the income be paid to her during her life and on her death the corpus be divided among her seven children. The corpus was to go outright to five of the children and the shares for the other two were to be held in trust, the income to be paid to each such beneficiary for his life. One of these latter beneficiaries, Abner J. Sevier, was the one designated to receive the income here involved. Under the third and final amendment to the trust agreement it is provided that: "The part of this trust estate bearing the name of the said Abner J. Sevier * * * shall be continued in trust for his use and benefit so long as he shall survive, and during such continuance the Trustee shall pay to or expend for and on his behalf all of the net income derived from the part bearing his name. Upon the death of the survivor of the Trustor and the said Abner J. Sevier the Trustee shall pay, deliver and convey all of the part of the trust estate bearing the name of the said Abner J. Sevier and then remaining in its hands in equal shares to his children, James Abner Sevier and Robert Melvin Sevier, or to the survivor of them, * * *. Each and every beneficiary of this trust shall be without right, power or authority to sell, assign, pledge, hypothecate by mortgage or deed of trust, or in any manner encumber, anticipate or impair his or her beneficial or legal interest in the trust or any part thereof, and no part of the income and/or principal of the trust shall be subject to the claims of any creditor of any beneficiary, nor liable to attachment, garnishment, execution or any other process of law." In October, 1941, Abner J. Sevier was arrested for the alleged commission of a crime and bail was set at $1500. On payment to him of $150, George J. Alvis, a bail bond broker and the husband of plaintiff, issued a bond, posted the bail, and Abner was released from custody. Abner disappeared October 4, 1941, before trial, and has neither been seen nor heard from since. George J. Alvis was required to make good on the bond. Approximately 13 months later the trustor died and Abner's share of the corpus was put in trust for him as provided in the trust agreement. The income has accumulated at the rate of approximately $100 per month and at the time of entry of judgment totaled the sum of $6,128. This accumulated income has been allocated by the trustee for the purpose of paying to or expending for and on behalf of Abner. On May 1, 1946, plaintiff, Dorothy E. Alvis, as administratrix of tthe estate of George J. Alvis, had recovered a judgment against Abner J. Sevier which, with interest and costs at the time of attempted execution, amounted to $2,916.69. The levy of execution June 1, 1947, on the defendant Bank of America National Trust and Savings Association, as garnishee, was returned unsatisfied on or about June 10, 1947. So far as the record shows, Abner has no other property within the state. The action was brought in November, 1947, to compel satisfaction of the judgment entered against Abner J. Sevier from the income accumulated to his benefit. Leave to intervene was granted by the court to James Abner Sevier and Robert Melvin Sevier, sons of Abner and remaindermen under the trust established for their father. They are the only appellants in this case.

The findings of fact of the court below held in part as follows: "That the accumulated income in the sum of $6,128.00 is surplus income, no part of which was paid to or expended for the beneficiary nor for his family. That no request for payment was ever made by beneficiary nor anyone in his family; that no proceedings were commenced at any time by beneficiary or his family to compel payment of any part of said income from the trust. * * * That the trust provision governing the payment of the income from said trust to Abner J. Sevier is not discretionary but directory and mandatory. That the said income was for the use and benefit of the said Abner J. Sevier so long as he should live. That said Abner J. Sevier is not dead. * * * That the interveners are not entitled to receive at this time the trust estate or any part thereof belonging to Abner J. Sevier, and there does remain the full corpus in said trust estate together with accumulated income which is surplus and subject to the claim of plaintiff creditor of Abner J. Sevier. * * * That the accumulated surplus income of the trust due, owing and unpaid to said Abner J. Sevier is subject to execution by the plaintiff herein." Judgment was given for $2,916.69 plus interest at 7 per cent on the original judgment in the amount of $2,706.25 from May 27, 1947, totaling $3,121.91, plus an amount due plaintiff as costs.

In considering this trust for the purpose of determining the appeal, it has been assumed that it is a spendthrift trust. Before passing to other legal problems presented, it should be noted that the wife of Abner J. Sevier, the beneficiary, is not a party to this proceeding. The sons, in intervening on the trial of the action, alleged that they "are entitled to receive that portion of the trust estate that bore the name of said Abner J. Sevier," but in their closing brief on this appeal they submit that "the judgment of the trial court should be reversed" and that the trial court should be directed to enter judgment in favor of defendant trustee bank "for the benefit of Abner J. Sevier."

[1, 2] It is the contention of appellants that four findings of fact are unsupported by the evidence. Two of the four findings may be considered together. They appear as follows: (1) "That no request for payment was ever made by beneficiary nor any one in his family"; (2) "That no proceedings were commenced at any time by beneficiary or his family to compel payment of any part of said income from the trust." Whether a "request" was made by the beneficiary or anyone of his family is of little importance except as it might have indicated a need or desire to use a part or all of the accumulated surplus income. If such a request was refused and there was "need" to use the surplus income, then it may be assumed that the beneficiary or his family would have sought to compel the trustee bank to institute proper proceedings for relief in San Mateo County, the county in which the trustee was doing business and the particular business pertaining to this trust, as appears from the "Agreed Statement of Facts." As hereinbefore stated, the court found "that no proceedings were commenced at any time by beneficiary or his family to compel payment of any part of said income from the trust." Courts take judicial notice of official judicial acts of the courts of this state, at least as limited to proceedings in the same matter which are not disputed. Code Civ.Proc., § 1875, subd. 3; 10 Cal.Jur. 728.

[3-7] The next finding attacked by the appellants is "That the accumulated income in the sum of $6,128.00 is surplus income, no part of which was paid to or expended for the beneficiary nor for his family." Civil Code section 859 provides: "Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which can not be reached by execution." "Surplus" according to the California rule is determined by the test of "the station in life of the beneficiary." In Canfield v. Security-First National Bank of Los Angeles, 13 Cal.2d 1, at page 21, 87 P.2d 830, 840, it is stated: "Under section 859 of the Civil Code the trial court is required to fix the amount necessary for the 'education and support' of the bene-

ficiary. The statute fixes no standards by which the amounts necessary for these purposes are to be ascertained. As was pointed out on the prior Canfield appeal, in ascertaining the proper allowance, the courts of New York and of this state have held that the beneficiary is entitled to receive free from the claims of his creditors sufficient income to support himself and those dependent upon him, according to the mode of life to which they have been accustomed, and to care for any affliction from which he or his family may be suffering. No set sum can be fixed to apply to all cases. The amount varies according to the station in life of the beneficiary." In the instant case it is impossible to show the necessity, if any, for "education and support" of the beneficiary. The interveners allege "That said Abner J. Sevier disappeared nearly seven years ago and, although diligent search and inquiry has since been made for his whereabouts, no trace nor word has since been obtained of him; that he has not been heard from within said time, and said interveners believe, and therefore allege, that said Abner J. Sevier is dead." In the complaint in intervention it is not alleged that the interveners are entitled to or need funds or ever needed any amount from the trust fund for "education and support." Civ. Code, § 859; Canfield v. Security-First Nat. Bank, supra. The general rule in such cases is that the burden of proving there is a surplus of income from a trust estate over that necessary for support is on the plaintiff creditor. Bogert, Trusts & Trustees, Vol. 1, § 227, page 751, note 45. However, here no such issue was raised and hence it was not necessary that plaintiff introduce evidence upon the subject of the support for the sons. The interveners offered no evidence in that respect. The nearest approach to a suggestion that there was need of financial assistance is the following found in the agreed statement of facts: "that since the disappearance aforesaid of Abner J. Sevier he has not contributed in any manner to the support of his wife who resides in San Mateo County, State of California; that said wife of Abner J. Sevier has no independent means of income and was entirely dependent upon said Abner J. Sevier for support and maintenance." There is no evidence to show that the wife is now solely dependent upon her husband or that she has been without support since his disappearance. In their closing brief the intervening appellants seek to leave the impression that they are supporting their mother, by calling attention to the legal provision that it is the duty of the children of "any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability." Civ.Code, § 206. No evidence is presented in the record to substantiate this suggestion of the interveners.

[8-10] It is incumbent upon the plaintiff herein to prove that the total accumulated amount above the principal sum of the trust is "surplus income." The agreed statement sets forth "that the approximate annual net income earned from said portion of the trust corpus has been $1,400.00; that no payments have been made by said trustee on account of income since the death of the trustor aforesaid; that the accumulated net income in the possession of said trustee at the date hereof is approximately $6,129.00." The word "surplus" as generally applied to a trust fund is the amount in excess of capital or corpus of the trust. As used in section 859 of the Civil Code it means the amount which remains after the need for education and supports satisfied. For recent definitions of the word "surplus" see First Industrial Loan Co. v. Daugherty, 26 Cal. 2d 545, 159 P.2d 921. The purpose of a spendthrift trust is to assist a beneficiary who is presumed incapable of wisely directing his own financial affairs. Under the provisions of section 859, if "no valid direction for accumulation is given" by the trustor the surplus accruing from the trust investments in excess of the amount needed for the education and support of the beneficiary may be awarded a creditor in the same manner as personal property which may not be reached by execution. In this case the total accumulated surplus has been allocated by the trustee bank for the beneficiary, Abner, or on his behalf. By that action the beneficiary acquired an enforce-

able equitable right to that amount, but the line-holding creditor may assert her right to prevent payment to the beneficiary of any amount due her from the trust surplus referred to in section 859. Though a trustor, as in this case, may use language designed to provide against the attachment of a beneficiary's interest by any creditors of the beneficiary, the Legislature has seen fit to prevent such an exercise of power by the trustor. "Section 859 constitutes a statutory modification—a statutory limitation—on the power to create such trusts. As far as trusts within the purview of the section are concerned, the legislature has determined that the trustor is without power to create any kind of trust—spendthrift or discretionary—that can successfully place the income, except the amount necessary for the 'education and support' of the beneficiary, beyond the reach of creditors of the beneficiary. California as thus placed a statutory limitation or restraint on the unlimited power of a donor to give his property to whom he may desire subject to whatever conditions the donor may want. at the same time, in recognition of the fact that public policy also requires that impecunious beneficiaries should be protected from their creditors so as to prevent them from becoming public charges, the legislature has provided that the amount of income necessary for their 'education and support' shall be free from the claims of creditors." Canfield v. Security-First Nat. Bank, supra, 13 Cal.2d at pages 12–13, 87 P.2d at page 835; see, also, Code Civ.Proc., § 688; 15 Cal.Jur. pp. 1018–1019.

Plaintiff contends that if a court were to determine Abner J. Sevier dead, thus to terminate the trust of which he is the life beneficiary, the allocated and accrued income would go to his estate and then be subject to the claims of creditors. This court does not deem it necessary to consider this contention; that problem is not before this court. The trial court found "That the said income was for the use and benefit of the said Abner J. Sevier so long as he should live. That said Abner J. Sevier is not dead." The evidence presented does not disclose that any amount was ever claimed as necessary for the support of the beneficiary, Abner, or his dependents. After payment of the Alvis judgment, however, there remains a balance of approximately 50 per cent of the accumulated "surplus" for any purpose for which it legally may be available.

The judgment entered in favor of plaintiff and against defendants and interveners is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

REDIKER v. REDIKER et al.

Civ. 16634.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1949.

As Corrected Jan. 3, 1950.

Hearing Granted March 2, 1950.*

Alice Gordillo Rediker brought suit against Abraham Sanford Rediker and others for separate maintenance and support, and Abraham Sanford Rediker and others brought a cross-complaint against Josefina Valle also known as Josefina Valle Rediker (co-respondent).

The Superior Court of Los Angeles County, William J. Palmer, J., rendered a judgment adverse to the plaintiff, and she appealed.

The District Court of Appeal, Moore, P.J., reversed the judgment in part and held that admission of Florida divorce decree in suit by the named defendant against a third party, was prejudicial error, that the named defendant was estopped to assert invalidity of his marriage to plaintiff, and was estopped to assert invalidity of Cuban divorce decree, that admission of testimony to impeach divorce decree of Cuban court was prejudicial error, and that failure of officiating notary in Cuba to adhere strictly to Cuban requirements in performing marriage did not invalidate the marriage.

*** Subsequent opinino 221 P.2d 1.**

1. Appeal and error ⚿197(3)

Where plaintiff failed at trial to specify alleged variance between defendant's cross-complaint and proof as ground of objection to admission of proof, plaintiff could not question ruling on appeal on ground of variance.

2. Appeal and error ⚿1050(1)
Evidence ⚿318(1)

In suit for separate maintenance wherein defendant denied that he was married to plaintiff, admission of divorce decree of foreign court dissolving defendant's marriage to a third person almost five years after defendant's marriage to plaintiff, was reversible error, where plaintiff was not a party to the divorce action and did not witness the trial, since the decree was hearsay as to plaintiff.

3. Marriage ⚿36

Defendant in suit for separate maintenance, was estopped to assert invalidity of his marriage to plaintiff, on ground that he was married to third party at time of marriage to plaintiff, where plaintiff, in good faith, had relied on a previous foreign divorce decree allegedly divorcing defendant from third party.

4. Divorce ⚿330

In suit for separate maintenance, wherein defendant contended that he was not married to plaintiff because at time of marriage to plaintiff he was married to a third party, testimony of defendant that he did not know whether he had instituted an action for divorce in Cuban courts or not and that he had merely given a friend in Cuba money to procure a divorce, was incompetent to impeach record of Cuban court showing that defendant was granted a divorce from third party. Code Civ.Proc. § 1916.

5. Evidence ⚿81

Laws of Cuba would be presumed by California court to be the same as those of California in absence of a showing otherwise.

6. Divorce ⚿330

One who instituted a divorce action against his first wife and caused a divorce decree to be entered, was estopped to deny its validity in suit by second wife for separate maintenance and support.

7. Marriage ⚿40(5)

In suit for separate maintenance and support, wherein defendant contended that his marriage to plaintiff was invalid on ground that at time of marriage he was married to a third party, there was a strong presumption that legal status of both plaintiff and defendant at time of their marriage was such as to qualify them to celebrate a marriage. Code Civ.Proc. § 1963.

8. Marriage ⚿18

The primary feature of a marriage contract is the agreement of the parties.

9. Marriage ⚿28

The non-compliance with statute governing the manner of solemnizing a marriage, does not invalidate marriage status effected by attempt to comply with statute. Civ.Code, § 68.

10. Marriage ⚿28

Failure of officiating notary to adhere strictly to requirements in Cuba where marriage took place, did not invalidate the marriage.

◆

William Ellis Lady, Los Angeles, for appellant.

Hahn, Ross, Goldstone & Saunders, and Philip Gordon, Los Angeles, for respondent.

MOORE, Presiding Justice.

"The way of transgressors is hard" as the parties to this action have discovered. Appellant in her suit for separate maintenance and support alleged that she and respondent were married November 28, 1939; that he had wronged her by his cruelty and adultery, and by reason thereof demanded judgment for support and for her share of the community property. He responded with a denial of the marriage and of the unlawful acts and by cross complaint declared that at the time he led appellant to the connubial altar she was the wife of one Rheingold Graf. The court soon determined the falsity of the cross complaint in that appellant had been divorced from Graf in 1933. But from the evidence the court found that at the time he engaged in the nuptial rites with appellant, respondent was the husband of Bessie Rediker. From this finding the court concluded that the marriage of the parties was void, awarded appellant certain moneys and adjudged the marriage to be annulled. While the appeal was from the judgment in its entirety, appellant has abandoned all save that portion of the judgment which annuls the marriage.

For the purpose of proving his marriage to Bessie respondent introduced the decree of a nisi prius court of Florida dissolving respondent's marriage to that lady. This decree bore date of August 28, 1944, almost five years after his marriage to appellant.

[1, 2] The ruling of the court in admitting the decree was prejudicial error. While appellant contends that it was a variance from the cross complaint and proved nothing there alleged, she is in no position to profit by such contention since she failed at the trial to specify the variance as a ground of her objection. Having failed so to specify she cannot question the court's ruling on appeal. Cushing v. Pires, 124 Cal. 663, 665, 57 P. 572. But the general objection to the Florida decree was sufficient to bar its admission. It was not admissible on any ground. It was offered to prove respondent's marriage to Bessie. In no sense was the decree or the inference to be drawn from its binding upon appellant. Since she was not a party to the action and did not witness the trial, the decree was hearsay. Having been entered nine years after his illicit relations with appellant had commenced and five years after respondent's ceremonial alliance with appellant was enacted it could have been procured for the very purpose of establishing a basis for annulment of the marriage to appellant. It is binding only upon the parties to the action, but not upon strangers.

While a finding of marriage usually precedes the judgment of divorce, still the res determined by decree is the freedom of the parties litigant from marital obligations to each other, not necessarily the existence of a prior marriage. Blumenthal v. Blumenthal, 97 Cal.App. 558, 561–562, 275 P. 987; Freeman on Judgments, sec. 752, p. 1582. See Petry v. Petry, 47 Cal.App.2d 594, 595, 118 P.2d 498.

The court found that "for many years prior to and at the time of said purported marriage ceremony, defendant was lawfully married to and was the husband of a woman known as Bessie Rediker" which marriage "was not dissolved until August 28, 1944." From such finding the court concluded that "as the defendant was the lawful husband of Bessie Rediker at the time he purportedly contracted marriage with the plaintiff, the purported marriage with the plaintiff is void. It becomes the duty of this court on its own motion, in behalf of the state and in pursuance of the state's long established policy to declare said purported marriage * * * to have been and to be void." While the conclusion follows the quoted finding, there is no competent evidence in the record to support the factual determination.

[3] Appellant contends that respondent was estopped to assert the validity of their marriage since she, in good faith, relied on a previous Cuban decree allegedly divorcing respondent from Bessie, citing Harlan v. Harlan, 70 Cal.App.2d 657, 161 P.2d 490; In re Estate of Davis, 38 Cal.App.2d 579, 584, 101 P.2d 761, 102 P.2d 545; Hengsen v. Silberman, 87 Cal.App.2d 668, 197 P.2d 356. The cited cases are not pertinent. They arose out of voidable marriages wherein each of the plaintiffs had done some act contrary to public policy and good conscience to induce the marital contract or had assented to the marriage attacked and for that reason was estopped to assert its invalidity. But sound equitable principles entitle appellant to an estoppel against respondent's plea of the invalidity of the Cuban decree even though she did not plead it. Indeed, she had no opportunity to do so. The asserted marriage to Bessie was not pleaded by respondent as ground for annulment. It was declared by respondent only after he had failed to prove an existing union of appellant and Rheingold. In response to

Rediker's new claim that he was the husband of Bessie when he contracted a marriage with appellant she replies that for sometime prior to November 28, 1939, she and respondent had lived in an illicit relationship as testified by respondent. It was established by competent proof that upon application for the issuance of a license to a person to be married, it is required by Cuban law that if he asserts a former marriage he must produce a copy of the decree that effected its dissolution. In view of such statutory requirement, it is presumed that at the time of his application in November, 1939, for marriage he presented to the notary who officiated a copy of some decree of divorce. Since it could not have been the Florida decree, which was entered five years later, it must have been the Cuban decree which had been entered in January, 1939. If he based his application upon the Cuban decree, Alice [appellant] relied on it and if it was not valid, her reliance was to her detriment. In that event, respondent is estopped now to assert the validity of the Cuban decree.

An authenticated copy of the proceedings instituted by respondent before the Court of First Instance at Havana was received in evidence. This document discloses that a decree of divorce dated January 27, 1939, was granted to respondent against Bessie. Basing its finding upon the testimony of respondent the court below determined that the Cuban decree was void in that Bessie "was never served with process in any such proceedings * * * if any were had, and not trial or hearing in connection with any such proceedings * * * for the purpose of divorcing the defendant from said Bessie Rediker."

[4] In the first place, there is no reason to doubt that such divorce proceedings were had. The authenticated document from the clerk of "The Court of First Instance For the Southern District of This Capital" discloses that in the action brought by Abraham Rediker against Beatriz [Bessie] Yalkut, a divorce was granted on January 27, 1939; that the court had jurisdiction of the complaint; that the matrimonial bonds existing between Abraham and Beatriz "are hereby dissolved leaving them free to contract new marriages." The decree ordered that "defendant be officially notified of this judgment" by posted notices at the court and "published also in the official Gazette of the Republic * * * she being in default." No "recourse" was taken against the judgment "within the legal term." Now what is the nature of the impeachment of that decree? Only the testimony of respondent. What was the nature of his testimony? He testified that he did not know whether he had instituted an action for divorce in the Cuban courts or not. "I had some friend there and I told him about it and that's all I know. I just gave him seventy-five dollars and I never heard of it anymore and that's all there was." He has not seen his attorney who represented him since the time "when I got divorced * * * when he made that paper out for me * * * he was was just recommended. I went and told him and he said all right * * * I don't remember signing any papers * * * I told him I wanted a divorce * * * he told me I was divorced and I never saw anything * * * I went around and represented that I was a single man * * * I met Alice in 1935. We then began living together. That was before I got the divorce from Bessie. In 1936 I gave her a lot and built a house on it. I married Alice in November, 1939." Such evidence was incompetent to impeach the record of the Cuban court. This can be done only by the means prescribed by law. Code Civ. Proc. § 1916. Respondent's testimony was therefore inadequate and ineffectual.

[5] Since the laws of Cuba are presumed to be the same as those of California unless shown to be otherwise, DeYoung v. DeYoung, 27 Cal.2d 521, 526, 165 P.2d 457; Wickersham v. Johnson, 104 Cal. 407, 411, 38 P. 89, 43 Am.St.Rep. 118; Perkins v. Benguet Consolidated Mining Company, 55 Cal.App.2d 720, 768, 132 P.2d 70, the decree of the Cuban court divorcing respondent from Bessie in 1939 must be a valid judgment. There is no proof of its invalidity. The court had jurisdiction, there was neither collusion of the parties nor fraud on the part of appellant herein.

Sec. 1916, supra. The ridiculous testimony of respondent that he gave a lawyer $75 to get a divorce from Bessie and that he knows nothing more about it is entitled to no respect. His callous disregard for the integrity of the courts that gave him protection is an indictment of his character and his testimony that he knew nothing of what his lawyer did and that he never saw what was done is too crude to challenge credulity. The admission of his testimony was prejudicial error.

Why should this Lothario receive such generous encouragement at the hands of a court as to accept his narrative to impeach the validity of a judgment of a court of justice whose robes are unsullied? Not only was his testimony calculated to deceive the court but he was impeached by his conviction of a felony. This fact alone should have infected his entire testimony with moral leukemia and have induced the trial court to look askance at all he said. Instead, the learned and astute trial judge brushed it aside with the observation that "it is easier to get a criminal judgment against a man than it is to get a judgment for a hundred dollars against him in a good, hard, contested civil case."

[6] Who will believe that a Cuban court would enter a divorce decree without the appearance of the plaintiff? or without service of process on the defendant? Judges in Cuba as in California make errors but they do not embezzle the power entrusted to them to aid pirates or to accommodate a temporary resident of the island to deceive the public. Rediker himself instituted the action for divorce against Bessie. He caused a decree to be entered and for that additional fact is estopped to deny its validity. He had been living with appellant five years when he applied in Cuba for the divorce. Because of their previous long intimacy it is inconceivable that he would have withheld knowledge of the decree from her. He is now estopped to deny that he did. In Brown v. Brown, 266 N.Y. 532, 195 N.E. 186, 187, the wife brought an action for support. Her husband attempted to show that the divorce he had procured from his first wife was invalid and that therefore his marriage to plaintiff was void. The Court of Appeals of New York held that he "may not be heard to impeach a decree or judgment which he himself has procured".

[7] Not only was respondent estopped to attack the Cuban decree divorcing him from Bessie, not only was the Florida decree incompetent proof of an existing marriage at the time of his contract with appellant but there is a strong presumption that the legal status of both parties was such as to qualify them to celebrate a marriage. Code Civ. Proc. § 1963, subd. 30; Budd v. Morgan, 187 Cal. 741, 744, 203 P. 754; Kelsey v. Miller, 203 Cal. 61, 90, 263 P. 200; In re Estate of Elliott, 165 Cal. 339, 343, 132 P. 439; Hite v. Hite, 124 Cal. 389, 394, 57 P. 227, 45 L.R.A. 793, 71 Am.St.Rep. 82; In re Estate of Crawford, 69 Cal.App.2d 609, 610, 160 P.2d 65; Moran v. Superior Court, 38 Cal.App.2d 328, 332, 100 P.2d 1096. Semper praesumitur pro matrimonio.

[8-10] From the proof the findings were made that the celebration of their marriage was unsuccessfully attempted by the parties before a notary public in Havana and that such proceedings "were not in full technical compliance with the applicable Cuban law." By virtue of such finding respondent contends that the marriage was void ab initio. In such contention he is not supported by reason or authority. The primary feature of a marriage contract is the agreement of the parties. That they do agree in the presence of others accentuates the solemnity of their vows. That they choose an official designated by the state to pronounce the consummation of a new status multiplies the seriousness of the agreement. While no one has attempted to render meaningless that statutory requirements of the procedure for a marriage it is the law that while section 68 of the Civil Code governs the manner of solemnizing a marriage, still noncompliance therewith does not invalidate the new status effected by the attempt to comply. People v. Lenniger, 22 Cal.App.2d 440, 441, 71 P.2d 306; Krizman v. Industrial Accident Commission, 14 Cal.App.2d 419, 422, 58 P.2d 405. Since the laws of Cuba are presumptively

the same as our own the failure of the officiating notary to adhere strictly to the Cuban requirements did not invalidate the marriage certified by him at the request of respondent.

That part of the judgment annulling the marriage of the parties is reversed.

WILSON, J., concurs.

McCOMB, J., concurs in the judgment.

LOCKE v. YORBA IRRIGATION CO. et al.

Civ. 3873.

District Court of Appeal, Fourth District, California.

Dec. 20, 1949.

Rehearing Denied Jan. 11, 1950.

Hearing Granted Feb. 16, 1950.*

Rosa Yorba Locke sued the Yorba Irrigation Company, a corporation, and others to quiet title to certain shares of named defendant's stock and enjoin cancellation of stock certificates.

From a judgment of the Superior Court of Orange County, Kenneth E. Morrison, J., for defendants, plaintiff appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment, holding that plaintiff's shares of the company's stock became appurtenant to her land when she conveyed her water rights to the company and received the shares, that she did not obtain title by adverse possession to water rights represented by such shares, and that restrictions in the company's by-laws against transfer of shares except with the lands for which issued were not waived by the company's issuance to plaintiff of stock certificates describing her shares as appurtenant to a portion of such land, after her conveyance of the rest to another, in so far as other owners of the land conveyed than those consenting to issuance of such certificates, were concerned.

1. Waters and water courses 🔑238

An irrigation company's articles of incorporation, by-laws, and certificate for shares of stock thereof constituted evidence of contract between holder of certificate and company, and such holder was bound by articles and by-laws.

2. Waters and water courses 🔑238

Under irrigation company's by-laws, prohibiting transfer of shares of company's stock except with lands for which issued and providing that conveyance of land should constitute transfer of stock appurtenant thereto, a land owner's shares of stock in company became appurtenant to her land when she conveyed her water rights to company and received stock thereof in return.

3. Waters and water courses 🔑238

An irrigation company's failure to record its by-laws, providing for delivery of water only to owners of company's stock and declaring stock appurtenant to lands described in stock certificates, until long after a stockholder's conveyance of part of her land to another, did not relieve grantor of such restrictions on delivery of water.

4. Waters and water courses 🔑127

A land owner, conveying all her water rights to irrigation company in return for shares of stock thereof and failing to use full amount of water available to her under such shares on portion of land retained by her after conveying rest thereof to another, did not obtain title by adverse possession to water rights represented by shares, where actual amount of water used by her did not interfere with rights of owners of land conveyed to use water thereon. Gen.Laws, Act 9113.

5. Waters and water courses 🔑127

To establish adverse possession of water, possession must be actual occupation, open and notorious, not clandestine, and must be hostile to true owner's title, held under claim of title exclusive of any other right, and continuous and uninterrupted for five years before commencement of action to quiet such title, though not necessarily next before commencement thereof.

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* Subsequent opinion 217 P.2d 425.

6. Joint tenancy 🔑12
Tenancy in common 🔑51

One joint tenant or tenant in common cannot bind his co-tenant by any contract made by him respecting common property.

7. Waters and water courses 🔑253

Where one conveying part of her land was informed by irrigation company that shares of its stock, appurtenant to entire tract, could not be issued as appurtenant to remaining portion only, without consent of owners of portion conveyed, and letters to company from owners of interests in such portion, consenting to issuance to grantor of stock certificates describing shares as appurtenant only to portion retained, was not signed by all owners of land conveyed, by-law restrictions against transfer of stock, except with land for which issued, were not waived by company's subsequent issuance of certificates to grantor for such shares so far as non-signing owners were concerned. Gen. Laws, Act 9113.

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Launer, Chaffee & Launer, Albert Launer, Walter B. Chaffee, Fullerton, for appellant.

Head, Wellington & Jacobs, Santa Ana, Friis & Schutz, Anaheim, McFadden, Turner & Owens, Anaheim, for respondents.

MUSSELL, Justice.

Action to quiet title to shares of mutual water company stock and to enjoin the cancellation of stock certificates.

Plaintiff was the owner of a 118-acre parcel of real property situated near the Santa Ana River in Orange County. This property, with that of other owners in the vicinity, received water served through what was known as the "Yorba Ditch". On December 30, 1913, the defendant, Yorba Irrigation Company, was organized under the laws of California as a mutual water company and on February 5, 1914, plaintiff and all other owners of land served by the Yorba Ditch conveyed to the company, "its successors and assigns forever all of their and each of their right, title and interest in and claim to, and right to take and receive water from the Santa Ana River for irrigation or other purposes, together with all of their and each of their riparian rights to take water from said Santa Ana River appurtenant to any and all land in the Rancho Canon de Santa Ana in the County of Orange, State of California, owned by them or any of them or in which they or any of them may have any right, title or interest". In return for the conveyance of individual water rights, each owner received one share of stock in the company for each hour of flow of the Yorba Ditch to which he had theretofore become entitled, and in return for the conveyance to the company of the water rights in the Santa Ana River with respect to her 118-acre parcel, plaintiff received seven shares of stock. The stock so issued was not apportioned to the lands on an acreage basis by the stock certificate or by the by-laws of the company and the stock issued was designated in the stock certificates as appurtenant to the respective particular parcels of land of the various owners. Plaintiff's seven shares were described as appurtenant to her entire 118 acres.

The provisions of the by-laws of the company, insofar as are applicable here, are as follows:

Article XVI

Shares of Stock

"Shares of stock in this company shall not be transferable except with the land for which it is issued, and a conveyance of the land shall constitute a transfer of the stock appurtenant thereto, to the purchaser.

"Each share of the capital stock shall entitle the owner thereof to one hours run of two hundred (200) inches of water every ten and one-half days, on the land owned by him and located under the canals of the company, water measured at the head of the company's ditch, and proportionate amounts for fractional shares."

Article XXIII

Restrictions on Delivery of Water

"Water shall only be sold, distributed, supplied or delivered by this company to owners of its capital stock and such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor."

Article XXIV

Transfer of Stock

"When such certificate shall be so issued and a certified copy of the preceding by-law (XXIII) recorded in the office of the County Recorder in the County where such lands are situated, the shares of stock so located on any land shall only be transferred with such lands and shall pass as an appurtenance thereto."

On November 12, 1919, the plaintiff and her husband conveyed 62 acres of the 118-acre parcel to Mary E. Rhorer. The deed covering this conveyance reserved to the grantors "the right of way for canals, flumes, aqueducts, etc., as conveyed to the Canon de Santa Ana Water Company, and reserving all right to water from the Santa Ana River as conveyed to the Yorba Irrigation Company, a corporation, by deed recorded in Book 250, page 66 of Deeds". Shortly after the execution of this conveyance the 62 acres was acquired by the predecessors in interest of the present defendants, other than the irrigation company, and was known as the "Goodwin-Dierker Tract". Goodwin and Dierker and their respective wives on March 28, 1922, were the record owners of this tract, each having an undivided one-fourth interest therein as tenants in common. The tract was subdivided and the defendants, other than the irrigation company, are owners of parcels of the land so subdivided.

At the time of the conveyance to Mary E. Rhorer the stock certificates issued to plaintiff did not recite that they were appurtenant to any parcel of land. Two certificates which had been issued to plaintiff in 1914 described three and one-half shares as appurtenant to the west one-half and the other three and one-half shares as appurtenant to the east one-half of the 118-acre parcel. These certificates had been cancelled in 1917.

In the early part of 1923 plaintiff sought to obtain a loan on the 56 acres retained by her and in this connection request was made that the irrigation company describe the seven shares held by plaintiff as appurtenant to the 56-acre parcel which she then owned. The company advised Mr. Locke that the request could not be granted unless the owners of the 62-acre tract consented to this arrangement or disclaimed any right to the stock and on March 28, 1923, Harry F. Dierker and Charles O. Goodwin, by letter to the company, consented that a stock certificate be issued to plaintiff describing the seven shares owned by her as appurtenant to the 56-acre tract. The company then issued a certificate which described the seven shares of stock as appurtenant to the 56-acre parcel, and subsequent certificates also described the stock as appurtenant to said land.

Several years later property owners in the Goodwin-Dierker Tract, including defendant Fickle, demanded that the Yorba Irrigation Company issue stock to them as appurtenant to the 62 acres conveyed by the Rhorer deed. On November 10, 1945, the irrigation company issued stock to defendant Fickle in proportion to the land owned by him and cancelled a like amount from plaintiff's shares, following which the present action was commenced.

The trial court found that on February 5, 1914, plaintiff conveyed to defendant, Yorba Irrigation Company, all her water rights in and to the Santa Ana River arising out of her ownership of the 118-acre parcel of land and that the seven shares of stock issued to her were appurtenant to all of said land; that plaintiff did not by her deed to Mary E. Rhorer reserve any portion of the stock of the irrigation company appurtenant to the 62 acres conveyed to the said Mary E. Rhorer. The court held that each of the successors in interest of Mary E. Rhorer, as to any portion of the land conveyed to her, was the owner of a portion of the seven shares of stock issued to plaintiff, said portion being determined by the number of acres or fractions thereof owned by each.

We conclude that the findings and judgment are supported by the evidence.

Plaintiff, by her deed to the corporation in 1914, conveyed all of her water rights to the Yorba Irrigation Company. Obviously, thereafter she had no water rights which could be reserved to her in the deed made in 1919 to Mary E. Rhorer. At the time of the conveyance to Mary E. Rhorer, the seven shares of stock which plaintiff owned were appurtenant to the entire 118-acre tract, and while Mary E. Rhorer could have presented her deed to the irrigation company and thereupon obtained a certificate of stock for the number of shares attached or appurtenant to the land conveyed to her, as shown by the books and records of the company, Statutes of 1923, p. 757; Deerings General Law, Act No. 9113, this was not done and the record shows that no demand was made for the issuance of stock as being appurtenant to the 62-acre tract until that of defendant Fickle in November, 1945.

[1, 2] The by-laws of the irrigation company provide that shares of stock shall not be transferred except with the land for which it is issued; that a conveyance of the land shall constitute a transfer of the stock appurtenant thereto to the purchaser; that when such certificate shall be so issued and a certified copy of the by-law recorded, the shares of stock on such land shall only be transferred with such lands and shall pass as an appurtenance thereto. The articles of incorporation of the irrigation company, the by-laws and certificate constitute the evidence of the contract between plaintiff and the irrigation company. Riverside Land Co. v. Jarvis, 174 Cal. 316, 327, 163 P. 54. Plaintiff, as a stockholder of the company, was bound by such articles of incorporation and regularly adopted by-laws. W. M. McFadden v. Board of Supervisors of Los Angeles County, 74 Cal. 571, 574, 16 P. 397. Under the provisions of the by-laws plaintiff's shares of stock in the company became appurtenant to the 118-acre tract when she conveyed her rights to the company and received stock issued to her. Wheat v. Thomas, 209 Cal. 306, 315, 287 P. 102.

[3] The company did not record the by-law relative to the transfer of stock until 1945. The by-laws provide that water shall only be sold, distributed, supplied or delivered by the company to owners of its capital stock and that such stock is appurtenant to certain lands when the same are described in the certificate issued therefor. The effect of the failure to record such a by-law was commented upon in the case of Security Commercial & Savings Bank of El Centro v. Imperial Water Co., 183 Cal. 488, at page 496, 192 P. 22, 25, in which the court said:

> "The findings of the court, including the stipulation between the parties as to the facts, indicate the probability that Imperial Water Company No. 1 had provided in its by-laws that the water it was distributing should only be 'sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to' the lands described in the certificate issued therefor, and that a certified copy of such by-laws had been recorded in the office of the county recorder in the county where the lands are now, or were then, situated, as provided in section 324 of the Civil Code as amended in 1895. (Stats. 1895, p. 118). If these be the facts, then under that section, the shares of stock can be transferred only with the lands, and can pass as an appurtenance thereto, and not otherwise. The result would be that a purchaser of the stock, without the land, would obtain by such purchase no title to the stock and no right to receive the water which the stock represents. Possibly the same results would follow from the by-laws and certificates, even if the copy of by-laws was not recorded. Riverside Land Co. v. Jarvis, 174 Cal. [316] 328, 163 P. 54; Estate of Thomas, 147 Cal. [236] 243, 81 P. 539; Thayer v. California Development Co., 164 Cal. [117] 136, 128 P. 21. But as to this we express no opinion."

In the instant case, however, the by-laws were recorded in 1945 and prior to the commencement of the present action. Plaintiff was bound by her contract with the company and the failure to record would not relieve her of the restrictions on delivery of water. The provisions of the by-law that the stock was appurtenant to her lands when described in the certificate issued to her are binding upon her.

[4, 5] Plaintiff contends that she obtained title to the water rights represented by the shares in controversy by adverse possession. However, as heretofore noted,

she conveyed all of her water rights to the company by her deed to the company and the court found from conflicting evidence that the plaintiff had not used the full amount of water available to her under the seven shares of stock on the 56 acres retained by her and that the use of the water by plaintiff on said land was not adverse to the claim of the defendants. The rule is that to establish adverse possession of water it is necessary that:

"(1) The possession must be actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action, not, however, necessarily next before the commencement of the action." (Lee v. Pacific Gas & Electric Co. (1936), 7 Cal. 2d 114.)

The testimony indicates that the actual amount of water used by plaintiff did not interfere with the rights of the defendants to use of water on the 62 acres conveyed to them if they had in fact desired to exercise their rights thereto.

[6, 7] It is contended by the plaintiff that the by-law restrictions were waived by the defendant company by its action in issuing stock following the receipt of the Goodwin-Dierker letter in 1923. However, it is apparent that the plaintiff was informed by the company that unless the consent of the owners of the 62-acre tract was obtained, the stock could not be issued as appurtenant to the 56-acre tract, and since the letter was not signed by all of the owners, such consent was not obtained. As heretofore noted, Goodwin and Dierker and their respective wives each had an undivided one-fourth interest in the 62 acres as tenants in common and one joint tenant or tenant in common cannot bind his co-tenant by any contract which he may make relating to the common property. Oberwise v. Poulos, 124 Cal.App. 247, 251, 12 P.2d 156; Most v. Passman, 21 Cal.App. 2d 729, 731, 70 P.2d 271; Brown v. Oxtoby, 45 Cal.App.2d 702, 709, 114 P.2d 622. It follows that there was no waiver insofar as the defendant Fickle was concerned or the other owners of property in the Goodwin-Dierker Tract.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

BECKER v. BECKER.

Civ. 17138.

District Court of Appeal, Second District, Division 1, California.

Dec. 29, 1949.

Hearing Granted Feb. 23, 1950.*

Divorce action by Walter J. Becker against Grace C. Becker, wherein wife was granted an interlocutory decree upon her cross-complaint. The decree required husband within two years to pay wife one-half the estimated value of certain community property and required wife to convey her interest to husband. The husband did not tender payment until 10 years later.

From orders of the Superior Court of Los Angeles County, Stanley N. Barnes, J., directing a sale of the property and an equal division of the proceeds, the husband appealed.

The District Court of Appeal, Drapeau, J., held that the husband had waived right to performance, and affirmed the orders.

1. Divorce 🔑254

Interlocutory decree of divorce was a final judgment, and so far as it spoke was conclusive of property rights of the parties. Code Civ.Proc. § 1908.

2. Divorce 🔑254

Interlocutory decree of divorce requiring husband within two years to pay wife one-half the estimated value of community property and requiring wife to confer her one-half interest to husband was not ambiguous or uncertain.

3. Divorce 🔑156

Interlocutory decree of divorce, so far as it determines rights of the parties, is a contract between them.

* Subsequent opinion 233 P.2d 479.

4. Divorce ⚷259

Where interlocutory decree of divorce required husband within two years to pay wife one-half the estimated value of community property and required wife to convey her interest in the property to the husband, but husband did not tender payment until 10 years later, husband's right to purchase was lost, and wife could not be compelled to accept payment and convey.

5. Vendor and purchaser ⚷18(4), 75

Agreement to purchase property ends with the time expressed in which the optionee or purchaser may exercise that right.

6. Divorce ⚷259

Where interlocutory decree of divorce required husband within two years to pay wife one-half the estimated value of community property and required wife to convey her interest to husband, if the contract embodied in the decree were construed as requiring payment within a reasonable time, a tender 10 years later was not within reasonable time.

7. Divorce ⚷259, 261

Where interlocutory decree of divorce required husband to pay wife one-half the estimated value of community property in two years and required wife to convey her interest to husband, the husband's failure to tender payment until 10 years later waived performance by wife and left him a tenant in common with her and justified an equal division of its greatly enhanced value at time of tender.

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Charles Murstein and Noel Edwards, Los Angeles, for appellant.

Kesler & Woodward, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff was married to defendant in 1911. They lived together until 1936, when plaintiff filed his complaint for divorce. The defendant wife was granted an interlocutory decree upon her cross complaint for cruelty; awarded custody of the then minor son of the parties; $85 per month for his and her support; and an interest in community real property.

The dispute in this case is over the real property, and the application to that dispute of Paragraph 5 of the interlocutory decree, which reads as follows: "That within two years from the date of this interlocutory decree of divorce, cross-defendant shall pay to cross complainant, the sum of Six Hundred Twenty-five and 00/100 Dollars ($625.00), in cash, said sum representing one-half (½) the estimated value of said two and one-half (2½) acres of land, community property of the parties hereto; that on the payment by cross-defendant of said sum of $625.00, cross-complainant will execute a good and sufficient instrument of conveyance to cross-defendant, or to such person or persons as he may direct, to all her right, title and interest in and to said two and one-half (2½) acres of land; that until such conveyance is made, cross-defendant shall pay all taxes that may be or have been assessed or levied against said real estate." The interlocutory decree was entered May 12, 1937; final decree followed June 11, 1938.

Plaintiff paid to his former wife $85 per month, both before and after the minor came of age. He paid the taxes on the real property, and according to his affidavit, spent approximately $1,000 filling and leveling the land. But he did not pay $625 to the wife, as directed in the interlocutory decree, and she did not convey her interest in the land to him.

In 1948, more than ten years after the interlocutory decree, plaintiff was offered $24,750 for the property. He then tendered to defendant $625, together with interest, and requested her to convey to him. This request was refused.

The matter came before the trial court upon a motion by the plaintiff for an order compelling the defendant to convey to him her interest in the land, according to the terms of the interlocutory decree. The court by minute and formal order directed that the property be sold and that the purchase price be divided between the former husband and wife, after deducting taxes and expenses of improvements paid by plaintiff, and expenses of sale. From these orders plaintiff appeals.

Plaintiff contends that Paragraph 5 of the interlocutory decree is a continuing contract, and that he is entitled to a deed at any time upon payment of $625; that the interlocutory decree is a conclusive judicial determination of the rights of the parties; a contract between them; and res judicata. He argues that before the expiration of two years he could not have been punished for contempt for not paying $625; that after that time he could have been cited for contempt, but nothing was done about it by the defendant; and that, anyhow, until the offer of purchase was made he was financially unable to pay. His affidavit sets forth that the payments of $85 a month were hard for him to make out of a fireman's pension of $100 a month, and meager earnings on the side.

Defendant contends that if the decree intended an option, it was for two years only; that now it would be inequitable to allow plaintiff to acquire the property for $625; and that plaintiff is estopped by laches to acquire defendant's interest in the property for that sum at this time.

It is apparent that the purpose of the interlocutory decree was to divide the community real estate equally. The decree fixed its then value and provided that one would get it upon payment of one half of its value to the other. Because of the failure of the plaintiff to comply with the contract embraced in the interlocutory decree, defendant has been deprived of the use of the money ordered paid to her for all these years. In the meantime the property has enhanced in value manifold. If the defendant had had the $625 when it should have been paid, she might have devoted the proceeds of her community one half of the property to some investment which would perhaps have enhanced in value as rapidly.

Certain fundamental propositions should be stated to reach a proper solution of this question.

[1] First, the interlocutory decree is a final judgment, and so far as it speaks, is conclusive of the property rights of the parties. Code Civ.Proc. sec. 1908; Hamilton v. Hamilton, 83 Cal.App.2d 771, 189 P.2d 722; Spahn v. Spahn, 70 Cal.App.2d 791, 162 P.2d 53.

[2] Secondly, the decree is not ambiguous or uncertain. Within two years from its date, the husband is directed to pay the wife $625, for which she is to convey the property to him or to his nominee.

Thirdly, the husband failed to obey the order. Now he seeks to compel conveyance by the wife in accordance with the order that for eleven years he disregarded.

[3-5] An interlocutory judgment of divorce, so far as it determines the rights of the parties, is a contract between them. London Guarantee & Accident Co. v. Industrial Accident Comm., 181 Cal. 460, 184 P. 864. This contract may not be enforced because of the failure of the plaintiff to comply with its plain terms. It is elementary that an agreement to purchase property ends with the time expressed in which the optionee or purchaser may exercise that right. 25 Cal.Jur. 521, and cases cited. In an agreement in which the conveyance and payment were to be fixed by the vendees' demand, it was held that such demand must be made within a reasonable time. Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522; and see for a statement of the rule Hughes v. Heffner, 29 Cal.App.2d 382, 84 P.2d 540.

[6] No matter what view may be taken of the effect of the order in this case, plaintiff lost his right to purchase. If it was his obligation to pay $625 within two years, he is out; if the payment was to be made within a reasonable time, he is also out, because the order of the trial court on his motion finds against him on that point.

[7] Now, it is but fair and equitable to divide the community property, as the trial court originally tried to do; but upon its present value. The decree presents a constructive condition precedent which the husband failed to perform. He waived performance by the wife and left himself a tenant in common with her. Thus construing the contract, it follows that the present orders implemented the intent of the interlocutory decree:—to divide the

community property equally, and in case the husband failed to pay the then value of the wife's share within two years, to direct its equal division later, either in kind or money.

The orders are affirmed.

WHITE, P. J., and DORAN, J., concur.

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95 Cal.App.2d 430

CROW v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 17077.

District Court of Appeal, Second District,
Division 1, California.

Dec. 30, 1949.

Rehearing Denied Jan. 23, 1950.

Hearing Denied Feb. 27, 1950.

Fred C. Crow sued the Bank of America National Trust and Savings Association, a National Banking Association, to recover amount of checks on which plaintiff's signatures were forged by his bookkeeper.

A judgment for plaintiff was entered by the Superior Court of Los Angeles County, Percy Hight, J., and the defendant appealed.

The District Court of Appeal, Doran, J., affirmed the judgment on grounds that evidence supported finding that defendant bank was guilty of negligence in cashing the checks and that plaintiff was not guilty of contributory negligence, and that error, if any, in admitting specimens of ability of plaintiff's to forge plaintiff's name was not prejudicial.

1. Appeal and error 🔑1001(1)

A verdict supported by some substantial evidence must stand on appeal unless it is pointed out that some prejudicial error of law has been committed by trial court.

2. Appeal and error 🔑1050(1)

In action by depositor against bank to recover amount of checks on which plaintiff's signatures were forged by his bookkeeper, where real questions were whether defendant bank was free from fault in cashing such checks, and as to plaintiff's alleged contributory negligence, error, if any, in admitting specimens of bookkeepers' ability to forge plaintiff's name, made out of court under conditions not fairly simulating conditions under which actual forgeries were made, was not prejudicial, particularly where defendant made full use of the specimens in examination of witnesses.

3. Banks and banking 🔑154(8)

Evidence supported finding that bank was guilty of negligence in cashing checks on which depositor's signatures were forged by depositor's bookkeeper and that depositor was not guilty of contributory negligence, so that bank was liable to the depositor for amount of the forged checks.

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Hugo A. Steinmeyer, G. L. Berrey, George L. Beckwith, Los Angeles, for appellant.

Swaffield, Madden & McCarry, Long Beach, for respondent.

DORAN, Justice.

The appeal herein is from a judgment entered upon a verdict in favor of plaintiff, a depositor in the defendant bank, in the sum of $7,912.62, representing the amount of 43 checks signed with plaintiff's name by a bookkeeper, Virgil Fore, without plaintiff's authority.

It appears that plaintiff operated three cafes in Long Beach, and about the middle of January, 1946 employed Virgil Fore, aged 21 years, as bookkeeper. Prior to the forgeries of plaintiff's signatures on which the present action is predicated, Fore had raised the amount of certain pay checks, such conduct commencing shortly after employment, which evidence is relied upon by the appellant as "showing conclusively the negligence of plaintiff in failure to detect and report" to the bank such earlier activities. In raising these earlier checks, Fore's practice was to prepare blank checks for plaintiff's signature, leaving a space between the dollar mark and the first figure in the amount; the line in which the amount was to be written in words was left blank and later filled in with a check writing machine. After plaintiff had signed the checks in that condition and bearing the correct amount in figures, Fore would then insert an additional figure immediately after the dollar sign, thus raising the amount from, say, $68.50 to $268.50, printing in the raised amount in words with the machine. The lower and correct amount, however, was entered on the check stub which therefore presented a normal appearance to anyone examining the check book. In all cases the fraudulent checks, whether of the earlier raised variety or of the later forged kind, were abstracted from the monthly bank statement by Fore as soon as same were received in the office, and immediately destroyed. At the trial, therefore, it was impossible to produce in evidence any of the forged checks involved in the present action. As before indicated, the present action is not predicated upon the earlier raised checks but upon checks bearing forged signatures.

It appears that Fore's first forgeries of Crow's signatures, committed in July, 1946, were effected by tracing plaintiff's genuine signatures; later the name was written freehand. The bank checks used were obtained from a spare check book and were therefore not numbered consecutively with the pay checks currently used. Fore caused Crow's books to appear in balance principally by the device of entering fictitious credits in the inventory account.

In June, 1946 Fore called the manager's attention to the absence of checks numbered 13291-13299 which should have been at the end of a check book. The manager, Juniel, thought "possibly the bank had not put them in when they made the books up", but went to the bank and stopped payments on the missing numbers. Fore had, in fact, abstracted the checks for use in forgeries, and reported the checks as missing, being about to leave on a "draft call", fearing that the loss of the checks might be discovered.

Finally, in June of 1947, while Fore was on vacation, Juniel, manager for plaintiff, discovered that a certain entry had not been made in the books. This resulted in an audit which lasted for six weeks, and exposed Fore's defalcations. Fore was arrested in the same month, and convicted of forgery.

It is contended in appellant's brief that the trial court "erred in admitting specimens of (Fore's) ability to forge the name of Crow, made out of court and under conditions not fairly simulating the conditions under which the actual forgeries were made." The plaintiff took the deposition of Fore in jail; Fore was handed pen and paper by plaintiff's attorney and thereupon made three signatures with a genuine signature of Crow in view and three imitations of Crow's signature from memory. Fore testified at the trial, identified the signatures made in jail and the same were admitted in evidence.

Respondent answers this contention by calling attention to the fact that this was not "experimental evidence" admitted for the purpose "of evidencing a tendency, capacity, or quality of external inanimate nature", in which case a similarity of conditions is required; that here the evidence in question concerned only "the ability of Fore to forge Crow's signature". Respondent further notes that after the exhibit went into evidence, "the defendant adopted it and made use of it as his own", by inquiring of various bank officers and employees whether such a signature would be approved for payment, and having such witnesses point out differences from a genuine signature and that the signatures made in jail were "kind of shaky". Apropos this matter it may also be noted that, although none of the forged checks could be produced at the trial owing to Fore's destruction of the same, there was and is no doubt of the forgery and the forger testified in detail as to methods used in perpetrating the crime.

Appellant also argues that in respect to the alleged "experimental" evidence admitted, "The Court erred in refusing to instruct the jury on the necessity for a foundation of similar conditions"; that the errors complained of were "grossly prejudicial", for the reason that "The evidence shows conclusively that the plaintiff was guilty of negligence in failure to detect and notify the bank of the earlier forgeries". It is also insisted that "Plaintiff was guilty of negligence in employing Fore after actual knowledge that he was a thief"; that the trial court "erred in refusing to instruct the jury that the plaintiff was negligent"; and that "The preponderance of the evidence was that there was no negligence on the part of the bank".

On the other hand, respondent's brief avers that "The burden of proof was on defendant to show that it was free from negligence," and that the plaintiff was guilty of negligence which contributed to the payment of the forged checks; that "plaintiff was not guilty of negligence in continuing Fore in his employment after Fore had * * * plead guilty to petty theft for the taking of some fender pants after his own had been removed from his car", as contended by appellant. Respondent insists that appellant is merely arguing the facts; that the same arguments were made in the trial court where the jury found against such contentions, for which reasons the judgment should be affirmed.

Appellant's conclusion is that, "As the defendant's evidence abundantly established, the plaintiff's gross negligence and the defendant's freedom from any negligence, except failure to detect the forgeries, if they were detectable by proper banking precautions, it must be said that, except for the admission of Exhibit 4 (specimens of Fore's ability to forge Crow's name), the verdict would probably have been in favor of the defendant", for which reason the judgment should be reversed. In this connection appellant insists that only "by indulging inferences based upon scintillas of evidence" could the jury have found for the plaintiff, and that "the competent evidence falls so far short of the quantum necessary to produce such a preponderance in favor of the verdict", that the error in admitting Exhibit 4 was prejudicial.

[1] It seems evident from the above statements that appellant's basic contention is predicated upon the view that, from the evidence before it the jury arrived at a wrong conclusion. But, under the well established rule of appellate procedure, a verdict supported by some substantial evidence must stand unless, of course, it is pointed out that some prejudicial error of law has been committed by the trial court.

[2] In so far as the admission of Exhibit A is concerned, any error, if error there was, must be deemed harmless. As respondent's brief points out, Virgil L. Fore, who had been convicted of forgery, testified in detail as to how, when and where the forged checks were made, which testimony is uncontradicted; there is, therefore, no serious question as to whether the checks were actually forged. The real questions at issue were, rather, whether the bank was free from fault in cashing such checks, and as to the plaintiff's alleged contributory negligence in reference to the same matter. These questions would still have remained even if the specimens showing Fore's ability to forge Crow's name, had not been admitted. Moreover, as respondent mentions, the appellant made full and complete use of the specimens, and examined several witnesses upon the question whether checks bearing such signatures would be approved for payment.

The record discloses much evidence introduced by both parties, bearing directly and indirectly upon banking procedures in general, and the alleged negligence of both the plaintiff and defendant in this particular case. The appellant's contention that the evidence shows "conclusively" that plaintiff's own negligence was the cause of the loss is not borne out by the record.

[3] There was certainly substantial evidence and legitimate inferences to be drawn from the evidence, in support of the jury's verdict. Doubtless, the record reveals evidence from which a contrary conclusion might have been drawn, but the determination of this question was exactly that for which the jury was empanelled. Such being the situation, the verdict must stand. There was, for example, evidence, which, if believed, would indicate that Fore's nefarious activities were so cov-

ered up that any ordinary inspection would fail to disclose the situation or furnish any reason for the employer to become suspicious. There was likewise evidence calling in question the bank's system of bookkeeping and safeguards against the paying of forged checks. All this undoubtedly presented questions of fact for the jury's determination.

No reversible error is presented in respect to the trial court's instructions to the jury. In the case of some of defendant's requested instructions, these sought to take from the jury questions of fact hereinbefore discussed, and were properly refused. Appellant's further contention that certain instructions given, unduly emphasized the matter of defendant's negligence is not borne out by the record. Nor does the record disclose any errors of a prejudicial nature.

The judgment is affirmed.

WHITE, P. J. and DRAPEAU, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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95 Cal.App.2d 368

PEOPLE v. CARMODY et al.

Cr. 4357.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1949.

Hearing Denied Jan. 26, 1950.

Richard Walter Carmody and Earl Irwin Juber were convicted in the Superior Court for Los Angeles County, Frank C. Collier, J., for robbery while armed with a deadly weapon, and thereafter Paul Nourse, J., denied probation and sentenced defendants. A petition in the nature of a writ of error coram nobis was subsequently denied, and defendants appealed.

The District Court of Appeal, Doran, J., affirmed the order, and held that the error in question was one which could have been considered on appeal, and that a writ of error coram nobis was not the proper remedy.

1. Criminal law 🔑997

Writ of error coram nobis will not issue where remedy by way of motion for new trial or by appeal could have been invoked. Rules on Appeal, rule 31.

2. Criminal law 🔑982, 997

Where jury in prosecution of two defendants charged with robbery while armed with a deadly weapon made specific finding that defendants were armed with a deadly weapon, and no appeal was taken, motion in the nature of a petition for writ of error coram nobis alleging that trial court made mistake of fact in that weapon used was in fact a toy pistol was properly denied, and defendants refused probation. Rules on Appeal, rule 31; Pen.Code, § 1203.

Morris Lavine, Los Angeles, for appellant Carmody.

No appearance for appellant Juber.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

DORAN, Justice.

The defendants Carmody and Juber were charged with the crime of robbery while armed with a deadly weapon; each pleaded "Not Guilty" and denied being armed as alleged. In a trial by jury the defendants were found guilty of robbery in the first degree, and each was found to have been armed with a deadly weapon. On September 17, 1948, Judge Frank C. Collier, the trial judge, having died, probation was denied by Judge Paul Nourse, as to each defendant on the ground that the trial court had no discretion in the matter since the probation reports indicated that the men were armed with deadly weapons. On the same day both defendants were sentenced to the state prison for the term prescribed by law.

Thereafter, on October 26, 1948, defendants filed a motion to set aside the judgment; a second such motion was filed on December 13, 1948; on December 15, 1948 this motion, treated as a petition for a writ of error coram nobis, was denied. On the defendant Carmody's appeal from such order, it is contended that the trial court erred in denying the petition for writ of error coram nobis; that in denying probation the trial court acted under a mistake of fact as well as of law, which mistake may be corrected by a writ of error coram nobis.

In a "Memorandum Opinion and Order", the trial court stated that probation was denied "under the belief that I had no discretion in the matter * * * induced by the statement to that effect in the probation reports before me, and statement therein which indicated that these men were armed, one with an automatic pistol and one with a revolver. From these reports I assumed that the evidence must have shown that these guns were loaded and therefore were deadly weapons. * * After these men were sentenced and when their time to move for a new trial or to appeal had expired, and they had been detained under the sentences that I pronounced, the case of People v. Morris Carmody came before me for trial. * * charged with being a party to the same robbery".

At that trial it was brought to the court's attention for the first time "(I) That the automatic pistol carried by defendant Juber was not loaded and that he had in the presence of one of the victims pulled the trigger several times to demonstrate that the pistol was not loaded. (The District Attorney now states that the evidence * * * showed said automatic to be a toy pistol.) 2. That the only evidence that the revolver carried by defendant Richard Carmody was loaded was the testimony of one of the victims, Mrs. Macchia, * * * that she noticed the cylinder on the revolver and by the light coming through the doorway thought she saw bullets in the cylinder. This witness is of a very excitable nature. Her testimony as to seeing bullets was uncertain and was not at all convincing to me. * * * That at the time Morris Carmody was arrested the revolver in question was found wrapped in cloth under the front seat of his car and was unloaded, and no cartridges were found in his possession. (This arrest took place about two months after the robbery in question.)"

The trial court's memorandum denying the petition for writ of error coram nobis then calls attention to the fact that "The record of each of these defendants is such as to indicate that they are proper subjects for probation". It is also mentioned that although the error in question could not have been raised upon motion for new trial since the time had expired, nor corrected by motion to vacate the judgment and resentence since the judgment was valid on its face and the defendants were immediately detained under it; "My error, however, could have been raised upon an appeal from the judgment * * * (since) I indicated clearly that I was not passing upon the merits of the application for probation but was denying probation because of lack of discretion on my part to grant it". There was no such appeal.

The appellant maintains that "whenever a trial judge acts upon a mistake of fact he may, upon a Writ of Error Coram Nobis, vacate his previous judgment and grant a new trial". In re Rothrock, 14 Cal.2d 34, 92 P.2d 332, is cited as authority for such procedure, which case however, as respondent points out, merely decides that where an appellate court, acting through a mistake of fact had remitted a cause to the court below, the remittitur could be recalled and corrected on the theory that the order was a nullity. No case cited in appellant's brief bears factual resemblance to the present situation.

Respondent's brief cites People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072, 1075, holding that "If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced." As hereinbefore noted, this was the situation in the instant controversy. Respondent also points out that "One of the issues before the jury was whether the defendants were armed with a deadly weapon. The jury made a specific finding that they were so armed. This being an adjudicated fact from which no appeal had been taken within the time prescribed by Rule 31 of Rules on Appeal, it is conclusive. The finding removed the matter of probation from the court's discretion. (Penal Code, Sec. 1203.)"

People v. Raner, 86 Cal.App.2d 107, 194 P.2d 37, is also cited by appellant. In that case, however, the appeal was from the judgment and no matter of a writ of error coram nobis was involved. In the Raner case, also, it was conceded that defendants were armed with an unloaded gun, a "dangerous" weapon making the crime first degree robbery under Section 211a of the Penal Code, but not a "deadly" weapon preventing probation under Section 1203 of the Penal Code. The trial court's erroneous conclusion that it was powerless to grant probation was held ground for reversal with directions to hear and determine the applications for probation. In the instant case, and differing from the Raner case, there was testimony from the mouth of the victim, that the appellant's gun was loaded, supporting the jury's finding to that effect.

[1] Respondent's brief calls attention to the case of People v. Mooney, 178 Cal. 525, 529, 174 P. 325, People v. Reid, 195 Cal. 249, 254, 232 P. 457, 36 A.L.R. 1435, etc., holding that coram nobis will not issue in any case where the remedy by way of motion for a new trial, or by appeal, could have been invoked. As mentioned in the trial court's memonrandum, the appellant herein could have taken an appeal from the judgment, but did not do so.

[2] Under the circumstances disclosed by the record, and the limited scope of the remedy afforded by writ of error coram nobis as set forth in the cases cited, it does not appear that appellant was entitled to relief thereunder.

The order is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur in the judgment solely on the ground that at the trial, one of the issues submitted to the jury was whether defendants were armed with a deadly weapon. That the jury, upon uncontradicted evidence made a specific finding that they were so armed. That no appeal was taken therefrom within the prescribed time, and therefore, such finding must be held to be conclusive, and cannot now by writ of coram nobis be readjudicated. People v. Young, 88 Cal.App.2d 601, 602, 199 P.2d 21.

Hearing denied; CARTER, J., dissenting.

95 Cal.App.2d Supp. 919

PEOPLE v. CHRISTIE.

No. 154944.

Appellate Department, Superior Court,
San Diego, County, California.
Nov. 25, 1949.

Rehearing Denied Dec. 13, 1949.

James K. Christie was convicted in the Municipal Court, City of San Diego, Edwin L. Thacher, J. pro tem, of violation of the Chiropractic Act, and he appealed.

The Superior Court, Appellate Department, Burch, J., held that the use by the defendant, a licensee under the Act, of a sign containing the legend "chiropractic physician" was in violation of the act, and affirmed the judgment.

1. Statutes ⇨181(1)

The principal purpose of judicial construction of statutes is to arrive at the intent of the lawgiver.

2. Physicians and surgeons ⇨10

A licensee under the Chiropractic Act may not use the word "physician" since he professes to heal without drugs or medicine, and a licensee may not save himself from violating the act by placing in front of such word the word "chiropractic". Gen. Laws, Act 4811, and § 15.

3. Statutes ⇨194

The rule of ejusdem generis simply means that general and specific words which are capable of an analogous meaning, being associated together, take color from each other so that the general words are restricted to a sense analogous to the less general.

◆

Stanford & McDonough, San Diego, for appellant.

James Don Keller, District Attorney of the County of San Diego, State of California, San Diego, and Ned A. Kimball, Deputy District Attorney, San Diego, for respondent.

BURCH, Judge.

Defendant was convicted in a trial by jury of violating Section 15 of the Chiropractic Act, Gen. Laws Act 4811, an initiative measure adopted by the people in November, 1922. Defendant is a licensee under the Act and held himself out to the public by business cards and a sign on his office window as a "chiropractic physician". The jury was instructed, in effect, that if they found the defendant used the word "physician" they must find him guilty under the Act. On appeal, defendant makes no contention that the section is unconstitutional. It is his position that his use of the term "chiropractic physician" is not deceptive of his status as a licensed chiropractor, and that on a proper construction of the section he was entitled to go to the jury on the question whether by using the word "physician" he indicated to the public that he held a license other than to practice chiropractic.

The section of the initiative measure in question reads as follows: "Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title 'chiropractor' or 'D.C.' or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor', or 'D.C.' immediately following his name, or the use of the letters 'M.D.' or the words 'doctor of medicine,' or the term 'surgeon,' or the term 'physician,' or the word 'osteopath,' or the letters 'D.O.' or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the state of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both."

The treatment of human disorders by those who profess to be skilled therein has been the subject of regulation by the lawgivers from an early date in the history of California (20 Cal.Jur. 1054). A prominent feature of this regulation is the requirement of a license. The license distinguishes the particular branch of the healing art in which the practitioner professes to be skilled, and thus reserves to the patient the choice of treatment.

[1] All parties are in accord with the text writers (Radin, Statutory Interpretation, 43 Harvard Law Review 863; Radin, A Short Way With Statutes, 56 Harvard Law Review 388; Pound, The Common Law and Legislation, 21 Harvard Law Review 383; Gray, The Nature and Sources of The Law, 2nd Ed., Chapter VIII, Statutes), and the decisions, Kaiser v. Hopkins, 6 Cal.2d 537, 58 P.2d 1278; Helping Hand Home for Children v. County of San Diego, et al., 26 Cal.App.2d 452, 79 P.2d 778; People v. Strickler, 25 Cal.App. 60, 142 P. 1121; United States v. Gilliland, 312 U.S. 86, 93, 61 S.Ct. 518, 85 L.Ed. 598; Texas v. United States, 292 U.S. 522, 534, 54 S.Ct. 819, 78 L.Ed. 1402. See, also, Shoults v. Alderson, et al., 55 Cal.App. 527, 203 P. 809, that the principal purpose of judicial construction of statutes is to arrive at the intent of the lawgiver. Professor Gray lays down a rule of construction as follows: "Interpretation is of two kinds, grammatical and logical * * * Grammatical interpretation is the application to a statute of the laws of speech; logical interpretation calls for the comparison of the

statute with other statutes and with the whole system of Law, and for the consideration of the time and circumstances in which the statute was passed." (The Nature and Sources of The Law, supra, page 176.)

In this case, the legislative history affords an accurate and compelling guide to the meaning of the measure which concededly is somewhat hidden if considered only in its grammatical or literal sense. Successive drafts of the Medical Practice Act from its enactment in 1876, Stats. 1875–6, p. 792, have emphasized the distinction among practitioners of the healing arts between those who employ medicines and those who do not. This dichotomy is implicit in the chapter on medicine in the present Business and Professions Code, Stats. 1937, p. 1377. Section 2135 of that code empowers the Medical Board to issue four forms of certificates, which are designated (a) physician's and surgeon's certificate; (b) drugless practitioner's certificate; (c) certificate to practice chiropody; and (d) certificate to practice midwifery.

In 1922 there was prepared and submitted to the voters the present Chiropractic Act, Stats.1923, p. XX, initiative measure, approved November 7, 1922, effective December 21, 1922, Gen.Laws, Act 4811, which was adopted in the November election of that year. At the same time, the present Osteopathic Act, Stats.1923, p. XXV, initiative measure, approved November 7, 1922, effective December 21, 1922, Gen.Laws, Act 5727 was adopted by popular vote. At the time these initiative measures were adopted, the Medical Practice Act of 1913 was in effect, Stats.1913, p. 722. By that Act only two certificates were authorized to be issued; (1) a physician's and surgeon's certificate authorizing the use of drugs and medicines, and (2) a drugless practitioner's certificate.

[2] Whoever framed the Chiropractic Act for submission to the people for its adoption or rejection by a "yes" or "no" vote obviously had in mind the existing provisions of the Medical Practice Act which made ineligible for a physician's and surgeon's certificate those practitioners of the healing art licensed to practice without drugs. What Professor Gray has referred to in the quotation above as the logical method of interpretation was the approach of the Supreme Court in In re Rust, 181 Cal. 73, 183 P. 548. In that case, by reason of part of the history we have related above, the Supreme Court denied to one licensed under the osteopathic law then existing, the benefits and prerogatives of the title "physician" on the theory that a physician practiced with drugs and an osteopath was a drugless practitioner. By the same token and by the same process of interpretation, we come to the conclusion that a chiropractor under the existing chiropractic law, and particularly Section 15 of the chiropractic law, is specifically denied the right to employ the word "physician", since he professes to heal without drugs or medicines.

In the light of the historical background of this and similar legislation, we conclude that Section 15 of the Act denies to a licensed chiropractor the right to use the word "physician".

We are not impressed with the argument that defendant has saved himself from violating the Act by adding the word "chiropractic" to the word "physician". There can be no use of the word "physician" by a practitioner of the healing arts except to color and imply a license to practice with drugs. This is the view suggested by the adoption of the Act in its present form if we have properly construed its meaning. See In re Rust, 181 Cal. 73, 183 P. 548, and Shoults v. Alderson, et al., 55 Cal.App. 527, 203 P. 809.

[3] Defendant cites the case of People v. Strickler, 25 Cal.App. 60, 142 P. 1121, and argues that the rule of ejusdem generis, there defined, supports the contention that the express requirement of the Act in question, that the other words forbidden must be deceptive—a result which can only be determined as a question of fact—leaves open the question of whether "physician" is a deceptive word. The rule of ejusdem generis "* * * simply means that: 'General and specific words which are capable of an analogous meaning, being associated together, take color from each other,

so that the general words are restricted to a sense analogous to the less general.'" People v. Strickler, supra, 25 Cal.App. at page 61, 142 P. 1121, 1122.

In the Act before us we have the specific word "physician". The words of a general nature are not specified but are confined to those which may carry the color of deception which we have shown by the legislative history attaches to the word "physician" when used by one licensed to practice without drugs. Here the generic words must have the special significance of the word "physician" to come within the bane of the statute. The distinction made by the Act between the two types of practitioners, those who use drugs, and those who do not, has been held to be a reasonable classification In re Rust, supra. Therefore, in view of the meaning which attaches to the statute in consideration of its express terms, and the aim and nature of the class of legislation to which the Act belongs, we would construe the statute as did the court below and find no error in the instruction given the jury at the trial.

The judgment is affirmed.

TURRENTINE P. J., and GLEN, J., concur.

34 Cal.2d 580

MAINS v. CITY TITLE INS. CO.

S. F. 17984.

Supreme Court of California, in Bank.
Dec. 28, 1949.
Rehearing Denied Jan. 26, 1950.

Mary E. Mains, as administratrix of the estate of Earl L. Mains, deceased, sued the City Title Insurance Company, a corporation, to recover an amount paid to the beneficiary of a deed of trust from the purchase price of land belonging to the estate of plaintiff's decedent which had been received.

The Superior Court, San Francisco County, Sylvain J. Lazarus, J., rendered judgment for the plaintiff, and defendant appealed.

The Supreme Court, reversed the judgment and held that the sale of realty by an administratrix which was not made pursuant to express order of court was not a judicial sale so that the administratrix was legally bound to convey an unencumbered title and the defendant escrow holder through which the purchase price was paid could satisfy the deed of trust of record on the realty without specific authority.

Carter, J., dissented.

Prior opinion 204 P.2d 927.

1. Executors and administrators 🔑148
Judicial sales 🔑52
Vendor and purchaser 🔑37(3, 4)

Under a judicial sale, doctrine of "caveat emptor" requires purchaser to avail himself of all the means of information at hand to ascertain the quality of the property and the character and extent of the title, and the deed of an administrator is in nature of a mere quitclaim, but rule does not apply to sale of land between vendors and purchasers generally.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Caveat Emptor".

2. Escrows 🔑7
Executors and administrators 🔑145

Sale of realty by administratrix not made pursuant to an express order of court was not a "judicial sale" so that administratrix was bound to convey an unencumbered title and escrow holder through which purchase price was paid could satisfy deed of trust of record without specific authority. Probate Code, §§ 755, 780 et seq.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Judicial Sale".

3. Escrows 🔑7
Executors and administrators 🔑148

Where notice of sale of realty by administratrix stated that realty would be sold subject to all state and county taxes and whatsoever assessments of whatsoever name or nature, purchaser and escrow holder through which purchase price was paid could rely on notice as offering realty for sale without lien of deed of trust of record so that escrow holder could satisfy deed of trust without specific authority. Probate Code, § 755, 780 et seq.

4. Executors and administrators 🔑148
Vendor and purchaser 🔑134(1)

Word "taxes" and "assessments" in a notice of sale of realty by administratrix do not describe a deed of trust and excepting property purchased at a judicial sale, there is an implied condition that the realty will be conveyed free from encumbrance.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Assessments" and "Taxes".

5. Vendor and purchaser 🔑134(1)

When sale of realty is made subject to a certain encumbrance, purchaser may rely on a similar condition that realty is free from any other encumbrance.

6. Escrows 🔑14(1)

Where administratrix is legally bound to convey an unencumbered title to realty, escrow holder through which purchase price is paid would be liable only for nominal damages on contract for satisfying deed of trust of record on realty without specific authority.

7. Money received 🔑1

Although an action for money had and received is one at law, it is governed by principles of equity and may be brought whenever one person has received money which belongs to another and which in equity and good conscience should be returned.

8. Escrows ⚷14(1)

Where administratrix was legally bound to convey an unemcumbered title to realty and escrow holder through which purchase price was paid satisfied deed of trust of record on realty without specific authority, equity and good conscience would not permit administratrix to recover amount paid by escrow in action for money had and received.

◆

Tobin & Tobin, Richard Raoul-Duval, San Francisco, for appellant.

Roland Becsey, Joseph B. Bates, San Francisco, for respondent.

EDMONDS, Justice.

Certain real property owned by the estate of which Mary E. Mains is administratrix was sold by her in accordance with the procedure specified by the Probate Code. City Title Insurance Company, as the escrow holder through which the purchase price was paid, used a part of it without specific authority to satisfy a deed of trust of record. The appeal from the judgment adverse to the title company presents for decision the questions of the legal character of the sale and the escrow holder's liability for paying the debt.

At the time of his death, the decedent owned certain real property subject to a trust deed to secure a note upon which about $3,800 was owing. Pursuant to section 780 of the Probate Code, the administratrix published notice that the property would be sold at private sale for cash. The terms and conditions of sale were stated as follows: "Purchaser to assume the payment and take the property purchased by him, subject to all the State and County taxes and whatsoever assessments of whatsoever name or nature which are now or may hereafter be charged as a lien against the property purchased by him."

The bid of $11,450 made by one Derkatch was accepted by the administratrix. Neither party mentioned the deed of trust; it was not discussed by them nor was any express representation made as to any encumbrance.

The sale was confirmed by the probate court and thereafter the administratrix deposited with the title company a deed to the property. In return she received a "Receipt for Papers", which provided that the deed was to be delivered upon receipt of $11,450 with credit for a deposit of $1,145, less incidental charges. The space on the receipt opposite the printed heading, "pay mortgage—deed of trust" was left blank.

Before closing the escrow, the title company paid the principal and interest owing on the trust deed note and tendered the remainder, less unquestioned amounts of expenses, to the administratrix. She refused to accept the tender and the present action followed. The trial court determined that she is entitled to approximately $10,300 and the appeal is from the judgment in her favor.

The title company contends that the buyer at a probate sale under sections 754, 780 et seq. of the Probate Code purchases the property free and clear of any encumbrances. It also argues that it had implied authority to pay off the existing deed of trust, since the administratrix was legally bound to convey an unencumbered title. As an additional ground for reversal of the judgment, the appellant asserts that the administratrix cannot maintain an action for money had and received because equitable principles bar recovery of the amount of a debt which she was legally obligated to pay.

In support of the judgment, the administratrix takes the position that the purchaser at such a probate sale acquires only such right, title and interest as the estate has to convey, subject to all equities, liens and encumbrances. She declares that the title company was her special agent, and having collected the purchase price on her behalf, it is liable for the whole amount, less the charges it was specifically authorized to pay. In this connection, she charges that the title company, in paying off the obligation under the deed of trust, was a mere volunteer and cannot offset the sum so disbursed.

[1] Under a judicial sale, "* * * the doctrine of *caveat emptor* requires the

purchaser to avail himself of all the means of information at hand to ascertain the quality of the property and the character and extent of the title, and the deed of an administrator is in the nature of a mere quitclaim." In re Estate of Backesto, 63 Cal.App. 265, 269, 218 P. 597, 598, citing Miller & Lux v. Gray, 136 Cal. 261, 68 P. 770; see Hammond v. Cailleaud, 111 Cal. 206, 43 P. 607, 52 Am.St.Rep. 167. On the other hand, this rule does not apply to a sale of land between vendors and vendees generally. "From the use of the word 'grant,' in any conveyance by which an estate of inheritance * * * is to be passed, the following covenants * * * are implied, unless restrained by express terms contained in such conveyance: * * * 2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him." Civil Code, sec. 1113. Unquestionably, prior to 1919, a probate sale was a judicial sale under which the purchaser obtained no more than a quitclaim deed and the doctrine of *caveat emptor* was applicable. Miller & Lux v. Gray, supra; In re Estate of Verwoert, 177 Cal. 488, 171 P. 105; In re Estate of Wickersham, 139 Cal. 652, 73 P. 541. This was clearly so because, under the old procedure, a probate sale was made pursuant to an order of court which expressly authorized the transaction. However, the 1919 amendment of section 1517 of the Code of Civil Procedure, now incorporated in section 755 of the Probate Code, changed the nature of such a transfer. By that amendment, the administrator was given power to sell the property in his discretion, subject only to approval of the sale by the court. Considerable reliance is placed by the title company upon the holding in Re Estate of Backesto, 63 Cal.App. 265, 218 P. 597, 598, which arose under the new procedure. In that case, the court said: "A sale is not, properly speaking, a judicial one, unless it is made upon express order of the court having jurisdiction of the subject matter of the sale, and which it directs to be sold for the purpose of carrying its judgment into effect, or of directing a disposition of its proceeds." It also stated that "the statutory requirement that no title shall pass until the sale be confirmed does not give to it the incidence of a judicial sale." Certainly this language would indicate that the sale to Derkatch was not a judicial one. But because the sale challenged in that case was made by an administrator with the will annexed, acting under the express authority conferred by the will, the decision should be placed in the category of persuasive argument rather than authority.

To the contrary is certain language in Hamilton v. Elvidge, 132 Cal.App. 21, 22 P.2d 239, 241, to the effect that "[t]he buyer at such a sale * * * is subject to the maxim of *caveat emptor*, and takes without warranty of the title of the decedent * * *." However, the facts of the case involved merely the validity of certain encumbrances representing money borrowed during the administration of the estate. These were held not to be subject to the doctrine, and therefore the language, insofar as it deals with an encumbrance existing at the date of death, is at best dictum.

[2] Section 754 of the Probate Code provides "* * * the executor or administrator may sell * * * either at public auction or private sale, using his discretion as to which property to sell first * * *." Although such a sale is subject to approval by the court, as observed in In re Estate of Backesto, supra, "A sale is not * * * a judicial one, unless it is made upon express order of the court * * *." Accordingly, as the sale to Derkatch was not made pursuant to such an order and the transaction was submitted to the court only for approval, it was not a judicial sale.

[3–5] Moreover, both Derkatch and the title company were entitled to rely on the notice of sale as offering the property for sale without the lien of the deed of trust. It stated that the property would be sold "* * * subject to all the State and County taxes and whatsoever assessments of whatsoever name or nature * * *." The words "taxes" and "assessments" do not describe a deed of trust, and excepting property purchased at a judicial sale, there is an implied condition that land will be conveyed free from encumbrance. Crim v. Umbsen, 155 Cal. 697, 103 P. 178, 132 Am. St.Rep. 127; Smiddy v. Grafton, 163 Cal. 16, 124 P. 433, Ann.Cas.1913E, 921. Also, when a sale is made subject to a certain encumbrance, the purchaser may rely upon a similar condition that it is free from any other one. Smiddy v. Grafton, supra.

Practical considerations underlying the administration of the estates of decedents also justify the conclusion that property sold pursuant to sections 754, 780 et seq. of the Probate Code is to be conveyed free of any encumbrance not stated in the offer. If the rule of *caveat emptor* should be held to apply to a sale of real estate in accordance with the procedure specified by section 754, it would be difficult or impossible to liquidate assets. Under such circumstances, no one could safely or intelligently make a bid. Normally the public records do not show the amount of money unpaid upon a note secured by a mortgage or deed of trust at a given time. As a matter of right, no inquiry can be made of the payee concerning the status of a loan and a request of that kind might require much more clerical work than any bank or financial institution were willing to assume. Also, quite certainly, if a reply were made, it would be on the basis of no liability for an error or omission and in many cases, because of residence in another state or for other reasons, the payee would not be readily accessible.

[6] The trial court found, upon substantial evidence, that the title company paid the amount necessary to satisfy the note and deed of trust without any instructions from the administratrix to do so. However, under the facts shown by the record, the lack of authority to make that payment does not establish liability. The deed of trust was an obligation directly related to the conveyance for which the escrow holder was responsible. If it had not paid the debt, the administratrix would have been obliged to do so, and she suffered no damage by the use of the estate's funds for that purpose. Had she sued upon the contract, she could have recovered only nominal damages from her special agent for doing that which she herself was legally bound to do in that very transaction. C.C. § 3360; see Kenyon v. Western Union Tel. Co., 100 Cal. 455, 35 P. 75.

Her action for money had and received is governed by different principles. Although there was no specific allegation in the complaint that the title company collected and received money for the use and benefit of the administratrix, the omission was cured by the answer to that effect. That is the theory of the case adopted by her, for she declares that, in reality, the complaint is one for money had and received, and any defect in it was cured by the answer. Unquestionably the trial was conducted upon that theory, and the evidence fully supports the conclusion of the trial court that the action was one for the common count of money had and received.

[7] Although such an action is one at law, it is governed by principles of equity, Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; Traders Finance Corp. of Ventura v. Sanders, 139 Cal.App. 191, 33 P.2d 474; Board of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97 N.E. 280, Ann.Cas.1913A, 471; Steuerwald v. Richter, 158 Wis 597, 149 N. W. 692. It may be brought "* * * wherever one person has received money which belongs to another, and which in 'equity and good conscience,' or in other words, in justice and right, should be returned. * * * The plaintiff's right to recover is governed by principles of equity, although the action is one at law." Philpott v. Superior Court, supra, 1 Cal.2d at page 522, 36 P.2d at page 640, 95 A.L.R. 990, quoting with approval from Page on Contracts, vol. 3, pp. 2510–4512, sec. 1473.

[8] Accordingly, as the action brought by the administratrix is governed by equitable principles, she cannot recover from the escrow holder the amount paid in discharge of the estate's obligation upon the very conveyance which the escrow holder was directed to effect. The equities might well be different if the payment had been applied upon a totally unrelated obligation of the estate, or if a volunteer were seek-

ing to recover the amount which he paid to satisfy the legal obligation of another. But equity and good conscience will not permit the recovery by the administratrix of an amount paid by the title company to relieve the estate from a legal obligation upon the very sale which was the subject of the escrow.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I believe that the sale of property by an executor is subject to the caveat emptor rule. The majority opinion reasons that a sale by an administrator not preceded by a court order therefor, but followed by confirmation, is not a judicial sale and, therefore, caveat emptor is not applicable. That is a non sequitur for the application of caveat emptor is *not* based upon whether it is a judicial sale or not. *It arises from other factors.* Hence, the turning point is not whether the sale is or is not a judicial one. It was said in the first case in this state on the subject: "The only effect of an administrator's deed is to convey to the purchaser *the title of the deceased.* Such a deed can contain no warranty of the title. *The purchaser must know the law.* The notice was of a probate sale. The bidder, therefore, knew the character of the sale, the effect of the deed, and was bound to examine the title for himself. The language of the notice put him upon his guard. In these sales, caveat emptor is the rule." Halleck v. Guy, 9 Cal. 181, 197, 70 Am.Dec. 643. In Miller & Lux v. Gray, 136 Cal. 261, 263, 68 P. 770, 771, it is said: "It is well settled that an administrator, in making sales of real estate, is the *mere instrument of the law to transfer such title, and only such title, as is held by the estate.* His deed is in fact but a quitclaim deed, and so it is uniformly held, touching such sales, that the doctrine of caveat emptor applies. * * * The same principle applies in case of lease. It is but an estate for years, carved out of and dependent upon the sufficiency of the title of the [larger] estate of the deceased. In this respect there is no distinction between a lease by an administrator and lease by a guardian; and it is uniformly held that a guardian's lease does not imply any covenant of quiet enjoyment. * * * Moreover, *an administrator cannot contract so as to make his estate liable, except as authorized by statute.* * * * Gray, as administrator, had the power to make this lease * * * but in leasing he carved out an estate for years from such title and interest only as was in the estate of Turner." [Emphasis added.] As late as 1935, this Court said in Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, 44, 53 P.2d 127, 132, (not cited in the majority opinion): "Appellant invokes the doctrine of caveat emptor to defeat respondent's recovery. This doctrine is applicable in so far as the estate's title to the demised property is concerned. Appellant leased *such title as the decedent had* at his death and it was respondent's duty to ascertain before bidding, the nature of that title, for it could not, after confirmation, complain of any defects therein." [Emphasis added.] See also, Blankenship v. Whaley, 124 Cal. 300, 57 P. 79; In re Estate of Verwoert, 177 Cal. 488, 171 P. 105.

Thus it is clear that the basis for the caveat emptor rule is that the administrator *cannot* sell or convey anything except the interest of the deceased at the time of his death; he is the mere instrumentality who, under supervision of the court (confirmation is indispensable) by which the deceased's interest is transferred; he has no authority to make any warranties unless authorized by the court; the purchaser is charged with knowing the quality of deceased's title. *In other words when one purports to sell the property of another by authority of law there is no warranty of title*, or, as expressed by Williston: "The commonest illustration of the principle referred to in the preceding section is found in sales by those who purport to sell by virtue of authority in fact or law. Such persons unless they expressly warrant title are not liable for the lack of title of the person who is supposed to own the goods * * * So in cases of sales made by a sheriff, or other judicial officer, or an auctioneer, or mortgagee, or assignee in bankruptcy, *or executor or administrator, or guardian,* or simply an agent, as such. If the seller either has authority in fact from a principal to make the sale, or if the principal is bound for any other reason by the agent's act in making the sale, well-known principles of agency will impose the same obligation upon the principal as if he had made the sale directly himself. The agent is not wholly free from implied obligation, but all that he warrants is his authority to act for the principal, and if he has not the authority which he assumes to have he will be liable. If the seller's authority is conferred upon him by law, as in the case of a sheriff, there can, of course, be no implied warranty by the owner of the goods any more than by the officer who makes the sale. Moreover such officers, unlike agents whose power is derived from authority in fact, do not warrant the validity of the authority which they purport to exercise. They are, however, liable for actual representations, fraud, or negligence in the exercise of their duties." (Williston on Sales [Rev.Ed.] sec. 220, p. 566.) [Emphasis added.] All of these things are for the benefit and protection of the creditors and beneficiaries of the estate and they are as certainly safeguarded by a confirmation after sale as by an order authorizing a sale. Hence, the question should not hinge on a technical definition of a judicial sale —whether an order for sale and confirmation after are required, or only confirmation. Rather, it depends upon the nature of the agent making the sale. To say that the legislature, merely by simplifying the sale procedure by eliminating the prior order, intended to wipe out the long and firmly established rule of caveat emptor is hardly reasonable. Indeed, the Probate Code still retains the provision which long existed, that the deed by an administrator conveys all the "right, title, interest and estate of the decedent * * * at the time of his death". Probate Code, sec. 786. Nothing more may be conveyed.

In my opinion the trial Court followed the correct rule of law in holding that plaintiff was entitled to the full purchase price paid for the property, and the judgment should be affirmed.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

34 Cal.2d 559

BROWN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 21008.

Supreme Court of California, in Bank.

Dec. 28, 1949.

Maurice C. Brown, petitioner, brought mandamus proceedings against the Superior Court of the State of California, in and for the County of Los Angeles, respondent, to compel the respondent to direct witnesses to testify in proceeding to perpetuate testimony.

The Supreme Court, Gibson, C. J., granted the writ and held that mandamus proceeding was the proper remedy, an appeal being inadequate, that facts alleged by petitioner were sufficient to entitle him to some kind of relief to enforce agreement for execution of mutual wills, and that he was entitled to have examination of witnesses in proceeding to perpetuate testimony, subject to objections on legal grounds.

Prior opinion, 202 P.2d 1070.

1. Depositions 🔑64(4)

A trial court has a clear duty to enforce statutory right to a deposition and to compel a witness to testify.

2. Appeal and error 🔑104, 870(2)
Mandamus 🔑4(3)

Order refusing to direct witnesses to testify in proceeding to perpetuate their testimony, was not an appealable order, and, though reviewable by appeal from final judgment, such an appeal involved expense and delay, and hence proceeding for writ of mandate against court would lie to compel witnesses to testify because appeal was inadequate. Code Civ.Proc. §§ 2083–2089.

3. Depositions 🔑11

Where husband and wife contracted to execute mutual wills providing that half of combined estates should go, at the death of the survivor, one-half to the relatives of each, and such wills were executed, and on death of husband wife took all of his property, and she conveyed substantially all of the property to second husband, one of the relatives of the deceased husband could bring action to obtain a declaration of his rights under contracts, could bring an action at law for damages, or could obtain equitable relief of quasi specific performance of contract, and therefore he was entitled to maintain proceeding to perpetuate their testimony. Code Civ.Proc. §§ 2083–2089.

4. Wills 🔑67

The promisees of a contract to make a will need not wait until the death of the promisor, but may seek equitable relief against inter-vivos conveyances made by him in fraud of their rights.

5. Wills 🔑65, 67

Where two parties agree to make mutual wills, each promising to dispose of his property to the other, or, if the other be dead, to certain third persons, and one of the parties performs by leaving his property to the other, third persons are entitled to enforce their rights as beneficiaries under agreement, and surviving party becomes estopped from making any other disposition of the property, and his obligations under the contract become absolutely irrevocable, at least where he avails himself of provisions of deceased's will in his favor and accepts substantial benefits thereunder.

6. Specific performance 🔑86

Where two parties agree to make mutual wills, and they do so, there need not be an express agreement that they shall not revoke the mutual wills in order to maintain an action against survivor to compel him to perform contractual obligation to leave property in accordance with contract to make mutual wills.

7. Contracts 🔑168

Every contract has an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the contract.

8. Wills 🔑64

Where parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed.

9. Courts 🔑472(4)

Probate decree in estate of deceased husband did not distribute property to wife under mutual wills free from any restrictions contained in contract to execute mutual wills, since jurisdiction over contracts to make a particular disposition of property by will rests in equity and not in probate.

10. Depositions 🔑64(1)

In a proceeding to perpetuate testimony, any question asked a witness is subject to objection on legal grounds, and witness need not answer until court rules that question is proper and should be answered. Code Civ.Proc. §§ 1991, 2083–2089.

◆

Edmond Gattone, Los Angeles, for appellant.

George I. Devor, Los Angeles, Irving N. Walker, Los Angeles, Mark Mullin, Los Angeles, of counsel, for respondent.

GIBSON, Chief Justice.

Petitioner secured an order from the Superior Court of Los Angeles County for the examination of Abigail Simpson, E. Ross Simpson and William Crandall in a proceeding to perpetuate testimony pursuant to sections 2083–2089 of the Code of Civil Procedure. The witnesses refused to answer certain questions, and the court denied petitioner's request for an order directing them to answer on the ground that petitioner had failed to show that he had a cause of action. This proceeding in mandate was then brought to compel the court to order the witnesses to testify.

[1] Insofar as the propriety of the use of the writ for this purpose is concerned, it

is well settled that there is a clear duty on the trial court to enforce the statutory right to a deposition and compel a witness to testify. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 392-394, 159 P.2d 944; Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605; Christ v. Superior Court, 211 Cal. 593, 296 P. 612; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 31, 99 P. 359, 17 Ann. Cas. 933. In some cases a writ has been used to test the right to take a deposition without discussion of the adequacy of another remedy, Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975; Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605; and in McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944, it was impliedly held that the order was not immediately appealable, and the remedy of appeal from a final judgment was held inadequate. See also Union Oil Co. v. Reconstruction Oil Co., 4 Cal.2d 541, 545, 51 P.2d 81; Collins v. Corse, 8 Cal.2d 123, 124, 64 P.2d 137. In other cases it was assumed for the purposes of the decision that the order was immediately appealable, but the remedy if available was deemed inadequate, Christ v. Superior Court, 211 Cal. 593, 296 P. 612; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 31, 39, 99 P. 359, 17 Ann.Cas. 933, and in still others the court used certiorari to review an order directing the taking of a deposition, thereby in effect holding that the order was not appealable. Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 298 P. 1001; Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006; Cailleaud v. Superior Court, 108 Cal.App. 752, 292 P. 145; Irving v. Superior Court, 79 Cal.App. 361, 249 P. 236.

[2] Three situations are presented by the above cases: (1) where a party seeks to perpetuate testimony under section 2083 et seq. of the Code of Civil Procedure prior to the bringing of an action; (2) where the deposition is sought under section 2021 after commencement of the action and pending trial; and (3) where the deposition is sought under section 2021 pending appeal and retrial upon a possible reversal of the judgment. We see no good reason for differentiating between these three situations insofar as appealability is concerned, or for departing from the cases which hold that the order is not appealable. Although such orders are, of course, reviewable by appeal from the final judgment, a party should not be required to proceed to trial without the benefits afforded by a deposition to which he is entitled, and it is well settled that under such circumstances the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy.

In his application for the order of examination petitioner alleged that he expects to be a party to an action against Abigail and her present husband, E. Ross Simpson, to determine his rights under a written contract to make mutual wills, entered into by Abigail and her deceased former husband, George Brown. By the terms of the contract George and Abigail agreed that they would execute mutual wills, each devising his or her entire estate to the other, and that "the survivor shall bequeath and devise the entire combined estates," one-half to designated kindred of George, of whom petitioner is one, and one-half to designated kindred of Abigail. Mutual wills were executed pursuant to the contract. Thereafter, George died, his will was probated, and his entire estate distributed to his widow. It was further alleged that she later married E. Ross Simpson and transferred substantially all her property, including that received from her former husband, to Simpson without consideration and with the intent to evade her obligations under the contract and to defraud its beneficiaries, namely, the kindred of George and herself.

The will of George Brown stated that it was made in consideration of a mutual will by Abigail and "in pursuance to an agreement between myself and my said wife * * * for the making of these mutual wills on the part of each of us." It then provided that his property should go to Abigail, if she should survive him, otherwise his entire estate, including any and all property or estate received from Abigail, should go one-half to his kindred and one-half to her kindred.

There is no express statutory requirement that the applicant for an order to perpetuate testimony must show that he has an actual or potential cause of action and it is not entirely clear from the cases whether such a showing is essential. See Demaree v. Superior Court, 10 Cal.2d 99, 103-104, 73 P.2d 605; Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 345, 298 P. 1001; Jonas v. Superior Court, 138 Cal.App. 677, 678-679, 32 P.2d 1114; Cailleaud v. Superior Court, 108 Cal.App. 752, 754, 292 P. 145. However, we need not determine whether there is such a requirement because we are of the opinion that, as contended by petitioner, he has stated facts which, if true, would entitle him to some kind of relief.

[3, 4] In his application for the order of examination petitioner asserted that his contemplated action was one to determine his rights under the contract and that he expected to seek legal and equitable relief for the purpose of protecting those rights. It seems clear that he would at least be entitled to bring an action to obtain a declaration of his rights under the alleged agreement. Code Civ.Proc. § 1060. He may also be entitled to other relief. It is well settled that a person may contract to make a particular disposition of his property by will, and in case of a breach the promisee has several available remedies. He may bring an action at law for damages. See O'Brien v. O'Brien, 197 Cal. 577, 588-589, 241 P. 861; Roy v. Pos, 183 Cal. 359, 366-367, 191 P. 542; Morrison v. Land, 169 Cal. 580, 590, 147 P. 259; 4 Page on Wills (Lifetime Ed.) §§ 1733, 1744. Equitable relief in the form of "quasi specific performance" of the contract may be obtained where the remedy at law is inadequate and the promisor has failed to make the promised disposition in his will. Jones v. Clark, 19 Cal.2d 156, 119 P.2d 731; Bank of California v. Superior Court, 16 Cal.2d 516, 524, 106 P.2d 879; Wolf v. Donahue, 206 Cal. 213, 273 P. 547. It has also been recognized that the promisees of such a contract need not wait until the death of the promisor but may seek equitable relief against inter-vivos conveyances made by him in fraud of their rights. Osborn v. Hoyt, 181 Cal. 336, 184 P. 854; Rogers v. Schlotterback, 167 Cal. 35, 48, 138 P. 728; see note, 108 A.L.R. 867; 4 Page on Wills (Lifetime Ed.) §§ 1727, 1729, 1744.

[5] The right to enforce such a contract to make a particular disposition of property on death is not restricted to the promisee. Where two parties agree to make mutual wills, each promising to dispose of his property to the other or, if the other be dead, to certain third persons, and one of the parties performs by leaving his property to the other, the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement. The contracting party who survives becomes estopped from making any other or different disposition of the property, and his obligations under the agreement become absolutely irrevocable and enforceable against him, at least where he avails himself of the provisions of decedent's will in his favor and accepts substantial benefits thereunder. Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198; Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52-55, 113 P.2d 495; see Rolls v. Allen, 204 Cal. 604, 609, 269 P. 450.

[6-9] It is argued by respondent that petitioner has not shown an actual or potential cause of action because he has not alleged that the contract between George and Abigail contained an express agreement not to revoke the mutual wills. It is not necessary, however, that there be an express agreement to this effect in order to enforce a contractual obligation to leave property to designated persons at death. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 771, 128 P.2d 665; Nelson v. Abraham, 29 Cal.2d 745, 750-751, 177 P.2d 931. Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the

property as agreed. The rights of the parties depend upon the contract, and the revocation of the will or other breach of the contract does not prevent the intended devisee or legatee from enforcing the contractual obligations. See In re Estate of Rolls, 193 Cal. 594, 601-602, 226 P. 608; Jones v. Clark, 19 Cal.2d 156, 119 P.2d 731; Bank of California v. Superior Court, 16 Cal.2d 516, 524, 106 P.2d 879; Wolf v. Donahue, 206 Cal. 213, 273 P. 547. As pointed out in Re Estate of Rolls, 193 Cal. 594, 601-602, 226 P. 608, while a will is revocable under section 23 of the Probate Code and the parties contract with knowledge of this fact, the obligation to make the agreed disposition may still be enforced.

There is a statement in Lynch v. Lichtenthaler, 85 Cal.App.2d 437, 193 P.2d 77, which is not in harmony with the foregoing principles. That case involved reciprocal wills but the trial court found that they were not made pursuant to any agreement. The District Court of Appeal in affirming the judgment stated, 85 Cal.App.2d at page 442, 193 P.2d at page 80: "Even if there had been clear and positive evidence that the testators had agreed to make reciprocal wills, it would have been necessary, in order for appellant to prevail, to show further that the wills had been made pursuant to an agreement not to revoke." The case of Notten v. Mensing, 20 Cal.App.2d 694, 697-698, 67 P.2d 734, which is cited as authority for the quoted language, does not support it. The statement is clearly erroneous and must be disapproved.

In the present case, if, as claimed, Abigail acquired George's property pursuant to an agreement to devise it to his relatives, she was under a duty to perform her agreement, and a breach of that duty would entitle petitioner to relief.

[10] There is no merit in respondent's contention that the probate decree in the estate of George Brown distributing the property to Abigail free from any restrictions is conclusive of petitioner's rights. It is well settled that jurisdiction over contracts to make a particular disposition of property by will rests in equity and not in probate. In re Estate of Rolls, 193 Cal. 594, 599, 226 P. 608; see Bank of California v. Superior Court, 16 Cal.2d 516, 524, 106 P.2d 879.

While the trial court erred in finding that the witnesses need not complete their depositions because petitioner had not shown a cause of action, it appears that some of the questions asked may have been objectionable on the ground that the answers would constitute a violation of the privilege of confidential communications and relationships. The trial court, however, did not pass upon any questions of privilege, and they cannot be determined at this time. The record is not clear as to what claims were made by all the witnesses in this regard, no facts appear from which it can be ascertained whether any claims of privilege were warranted, and the question has not been briefed in this court. Inquiry into the matter should not be foreclosed since, in a proceeding to perpetuate testimony, as in other deposition proceedings, any question asked is subject to objection on legal grounds, and a witness need not answer until the court rules that the question is proper and should be answered. Code Civ.Proc., § 1991. It follows that petitioner is not entitled to an order compelling the witnesses to answer all questions propounded but is entitled to a writ of mandate directing the trial court to set aside its order preventing the completion of the depositions and to make the necessary orders to effectuate those proceedings after passing upon any objections the witnesses may make to particular questions. Let the writ issue accordingly.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion and agree generally with the reasoning upon which it is based. I think it proper, however, to point out that the basic legal concept in the majority opinion is out of harmony with both McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944, and Hayes v. Superior Court, 16 Cal.2d 260, 105 P.2d

975, as neither of those cases squarely holds that there is a clear duty on the trial court to enforce the statutory right to a deposition and compel a witness to testify, and the Hays case particularly, which is cited with approval in the McClatchy case, holds directly to the contrary. I wrote a dissenting opinion in the Hays case and a concurring opinion in the McClatchy case in which I endeavored to expound the rule which the majority opinion in the case at bar appears to adhere to. In my concurring opinion in the McClatchy case, I stated, 26 Cal.2d at page 399, 159 P.2d at page 951: "The specific problem presented is whether a party to an action may, as a matter of right, require a witness to answer questions on the taking of his deposition relevant only to issues which have been eliminated from the case by dismissal of the cause of action or defense which raised such issues. This problem has been the subject of considerable controversy among trial judges and lawyers. The decisions of this court and of the District Courts of Appeal on the subject are in hopeless conflict, and it is little wonder that trial judges should have difficulty in determining the proper course to pursue when problems of this character are presented to them. One line of cases headed by San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933, answers this question in the affirmative. Another line of cases headed by the case of Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975, answers it in the negative. The majority opinion answers it in both the affirmative and negative, as it cites the Hays case with approval and then attempts to distinguish it from the case at bar."

If the majority of this Court have now decided to adhere to the rule announced in the line of cases headed by San Francisco Gas & Electric Co. v. Superior Court, supra, as the majority opinion in the case at bar appears to indicate, then the Hays case should be overruled and we would thereby eliminate the confusion which has arisen since the decision of that case. While it is apparent that the majority have now departed from the rule in the Hays case and have in effect overruled it *sub silentio,* I think the administration of justice in this state would take a step forward if the majority saw fit to expressly overrule that case and announce that the rule of San Francisco Gas & Electric Co. v. Superior Court, supra, would be the rule by which lawyers and trial judges would be governed in the future.

34 Cal.2d 589

EDWARDS v. FREEMAN.

S. F. 17994.

Supreme Court of California, in Bank.

Dec. 28, 1949.

Action by Eloney Edwards against William Otis Freeman for injuries sustained in collision.

From a judgment of the Superior Court of Fresno County, Arthur C. Shepard, J., in favor of defendant, the plaintiff appealed.

The Supreme Court, Schauer, J., held that under evidence which showed that plaintiff was riding to town with son while son was on a mission of his own, an instruction submitting issue of agency and imputed negligence which would bar plaintiff from recovering if her son was negligent was improper. Judgment was reversed and cause remanded for new trial.

Prior opinion, 205 P.2d 461.

1. Principal and agent ⚿8

"Agency" results from consent by one person that another shall act in his behalf and subject to his control, coupled with consent by the other so to act.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Agency".

2. Negligence ⚿93(14)

Driver of automobile is not agent of passenger, so as to give basis for imputation of driver's negligence to passenger, in absence of right of control.

3. Negligence ⚿90

Where mother who lived about half a mile from son asked son to take her with him the next time he went to town so that she could have her eyes tested, and on following day the son while on a mission of his own acceded to the request, the son was not agent of mother and any negligence of son in operation of automobile was not imputable to mother so as to preclude her recovery for injuries sustained in collision.

4. Appeal and error ⚿1066
Negligence ⚿138(4)

Where mother who lived about a half a mile from son asked son to take her with him the next time he went to town so that she could have her eyes tested, and on following day the son in accordance with request picked up his mother but before reaching town was involved in an accident which resulted in injuries to mother, instruction submitting issue of agency and imputed negligence was improper and prejudicial.

◆

C. Ray Robinson, Margaret A. Flynn, Merced, Lucius Powers, Jr., Fresno, for appellant.

Dearing, Jertberg & Avery, Fresno, for respondent.

SCHAUER, Justice.

Plaintiff appeals from a judgment rendered pursuant to a verdict for defendant in an action for personal injuries. The injuries resulted from a collision between a pick-up truck driven by defendant and an automobile which was owned and driven by plaintiff's adult son and in which plaintiff was riding. Conflicting evidence, which need not be summarized, would support a determination that plaintiff's injuries were proximately caused by the negligence either of plaintiff's son or of defendant, or by the simultaneous negligence of both drivers. Plaintiff herself was guilty of no contributory negligence and the jury were so instructed. She contends that the trial court erred to her prejudice by submitting to the jury the question whether plaintiff's son was her agent so that his contributory negligence, if any, would bar her recovery. With this contention we agree.

The evidence relied upon to show agency is as follows: Plaintiff's son, Ray Edwards, testified that on the day before the accident "I just happened by [plaintiff's home, which was about half a mile from the home of Ray], and she asked me would I be dropping into town sometime. She said next time I was going she'd like to go in to have her eyes tested. I told her, 'Well, I'm going in the next morning to have my arm [which was bandaged] undressed.'" Plaintiff testified, "Q. Why were you coming to town? A. I was coming to make an appointment to have my eyes tested to get some eye glasses. Q. When did you determine to do that? A. Oh, I had been intending to do that quite a while. The day before, the day before I came I seen the boy and asked him was he going; when he was aiming to come into town again. I told him whenever he come I wanted to come with him. He says, 'Well, I am going tomorrow.' —to make an appointment for my glasses." On the morning of the accident Ray picked up his mother at her home. Before they reached the city which was their destination, the accident occurred.

[1, 2] To permit a finding of agency upon this evidence would be, in effect, to hold that one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, can be an agent. This is not the law. "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." (Restatement, Agency, § 1.) "The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control." (Id., Comment on Subsection 1.) In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no "imputation" of the driver's negligence to the passenger. (Tousley v. Pacific Electric Ry. Co. (1913), 166 Cal. 457,

462, 137 P. 31; Marchetti v. Southern Pac. Co. (1928), 204 Cal. 679, 681, 269 P. 529; Thompson v. Fitzgerald (1928), 205 Cal. 563, 568, 271 P. 1072; Peri v. Los Angeles Junction Ry. Co. (1943), 22 Cal.2d 111, 127, 137 P.2d 441.) To paraphrase the pertinent language of Stoddard v. Fiske (1917), 35 Cal.App. 607, 609, 170 P. 663, 664, there was no evidence of any employment of the son by the mother; it is clear that the son undertook what he did in order to be of assistance to his mother and as an act of friendship or filial regard; "The doctrine of respondeat superior sought here to be invoked * * * must necessarily be based upon a relationship between two parties by which one has the legal right to direct the activities of the other and the latter the legal duty to submit to such direction." And, as said in the Marchetti case, supra (204 Cal. at page 681, 269 P. at page 530): "The negligence of the driver of a machine * * * cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. * * *"

A case quite similar to the one at bar is De Soto v. Pacific Electric Ry. Co. (1920), 49 Cal.App. 285, 286, 288, 193 P. 270. From the opinion it appears that (49 Cal.App., page 286, 193 P. page 271) "plaintiff on the night of the accident was riding in an automobile belonging to her brother-in-law whom she had requested to convey her, as a matter of friendly accommodation, to a nearby store. She exercised no control over the driver of the machine other than to indicate the place to which she desired to be transported. Under these conditions the journey was made to the store, and it was upon the return therefrom that the accident happened." It was held that as a matter of law (49 Cal.App. page 288, 193 P. page 272) "under the relationship shown to exist between the plaintiff and the driver * * * the facts were undisputed and a conclusion irresistibly indicated that no responsibility was fixed upon the appellant [plaintiff] for any act of negligence committed by the driver * * *." (See also Bryant v. Pacific Electric Ry. Co. (1917), 174 Cal. 737, 739–740, 164 P. 385; Irwin v. Golden State Auto Tour Corp. (1918), 178 Cal. 10, 14, 171 P. 1059.)

Defendant relies upon the following cases in support of his contention that the jury could infer an agency relationship from the evidence that plaintiff was riding with her son at her request: Gates v. Pendleton (1921), 184 Cal. 797, 802, 195 P. 664; Maberto v. Wolfe (1930), 106 Cal.App. 202, 206, 289 P. 218; Navarro v. Somerfeld (1939), 35 Cal.App.2d 35, 38, 94 P.2d 623; Graf v. Harvey (1947), 79 Cal.App.2d 64, 69, 179 P.2d 348; Souza v. Corti (1943), 22 Cal.2d 454, 461, 139 P.2d 645, 147 A.L.R. 861. See, also, Jacobus v. Brero (1923), 190 Cal. 374, 375, 212 P. 617; Henry v. Lingsweiler (1927), 81 Cal.App. 142, 155, 253 P. 357. These cases are neither controlling nor persuasive on the point to which defendant cites them. In some of them there was evidence from which a right of control could be inferred; in some, the existence of such right as an essential of the agency relation in order to constitute a basis for imputing negligence was not discussed.

[3] We are not unmindful that the testimony of plaintiff and her son was contradicted in various respects; among other things, Ray Edwards testified that on the day of the accident, after it occurred, he carried out his purpose "to have my arm undressed" and that the bandage was not replaced, whereas defendant testified that on the day following the accident he saw Ray wearing a bandage on his arm. Defendant argues that the jury could have concluded that the testimony of plaintiff and her son was impeached in part, hence the jury could have disbelieved their testimony that the son had a purpose of his own in driving to the city, and could have inferred that the trip was made at the sole instance and for the sole benefit of plaintiff. But disbelief of portions of the evidence relied upon to show agency cannot cure the lack of essential, affirmative evidence adequate to show that, whatever the principal or even the only reason for the trip, either the plaintiff was actually exercising control over the manner of operation of the car or

the relationship of plaintiff and her son was such as to give plaintiff a legally cognizable right to control or command the son in his operation of the machine. (See Marovich v. Central California Traction Co. (1923), 191 Cal. 295, 304, 216 P. 595.)

[4] The jury were instructed, "if you believe from the evidence that the auto trip being made by Mrs. Edwards and her son was being made on the business of Mrs. Edwards, at her instance and request and for her benefit, so that she would have some control over where and how the car was being driven, then Ray Edwards was her agent to the extent that if Ray Edwards was negligent and such negligence contributed proximately to the accident here in question, such negligence may be imputed to her and would prevent her from recovering.

"On the other hand, if Mrs. Edwards went along with Ray Edwards by his permission or invitation, where her trip was as a guest, incidental to Ray's trip, where she had no control nor say-so over where—how they were going nor how the auto was to be driven, there is no agency. There can be no imputation of negligence to her under such circumstances." There was no further explanation of the term "agency." The language of the instruction is easily, if not essentially, misleading in suggesting to the jury that, if the trip was "on the business of Mrs. Edwards," it would follow from that fact that she "would have some control" and therefore Ray "was her agent." The verdict may have resulted from the tenable view of the evidence that defendant was not guilty of negligence proximately causing the collision, or it may have resulted from the also tenable view of the evidence that simultaneous negligence of both drivers caused the collision, coupled with the untenable view of the law, upon this record, that Ray's negligence could be "imputed" to bar plaintiff's recovery. Upon the record here, where the evidence shows no more than a friendly or filial service, gratuitously rendered, it was error to submit the issue of imputed negligence to the jury and the error was clearly prejudicial because the inadequate and confusing instruction on the subject of agency at the least *permitted* the jury to find such a relation (if it be not understood as directly suggesting such a conclusion) from the mere "instance and request" of plaintiff. (See Huebotter v. Follett (1946), 27 Cal.2d 765, 770–771, 167 P.2d 193.)

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

34 Cal.2d 568

In re DOPKINS' ESTATE.

S.F. 17734.

Supreme Court of California, in Bank.

Dec. 28, 1949.

Proceeding in the matter of the estate of Virginia Estelline Dopkins, also known as Mrs. D. H. Dopkins, deceased, wherein Lyle B. Oliver offered for probate a will which was contested by Maye MacKechnie and others.

The Superior Court, Fresno County, Dan F. Conway, J., rendered a judgment on a verdict in favor of the proponent, and the contestants appealed.

The Supreme Court, Schauer, J., held that refusal to give requested instruction on undue influence was not error, and affirmed the judgment.

Prior opinion 202 P.2d 852.

1. Wills 🔑358

In will contest, an order denying motion for new trial is not appealable. Probate Code, § 1240.

2. Trial 🔑194(9)
Wills 🔑332

Requested instruction that "where a confidential relationship exists between the testatrix and the beneficiary under the will, coupled with activity on part of the beneficiary in the preparation of the will, and is profiting unduly thereby casts on the proponent the burden of showing that the will was not the product of such imposition", and that the mere fact that will was executed out of presence of proponent does not in itself refute charge of imposition or presumption, was properly refused because uncertain and confusing and because of failure to set forth any rule of law which could affect verdict favorably to contestants and because it invaded province of jury.

3. Appeal and error ⚿216(7)

On a technical detail of the law, attempted to be explained by requested instruction, the litigant must request proper and intelligible instruction if refusal to instruct is to constitute ground for reversing judgment.

4. Trial ⚿261

Where instructions are offered which cannot properly be given without modification, court may refuse to give them.

5. Wills ⚿332

In will contest, instructions given at request of proponent, relating to undue influence, were not objectionable.

6. Wills ⚿53(3)

Where guardian had been appointed for testatrix solely on allegation and finding of physical incapacity, the appointment was not evidence of mental incapacity.

7. Wills ⚿330(1)

Where guardian had been appointed for testatrix solely on allegation and finding of physical incapacity, refusal, in will contest, to instruct that appointment of guardian connoted a mental incapacity was not error. Probate Code, §§ 1460, 1461.

8. Wills ⚿384

In will contest, where counsel for contestants in cross-examining proponent asked whether proponent knew that testatrix had to be declared mentally incompetent to authorize appointment of guardian, court's comment, in ruling on objection, to effect that court did not believe a declaration or finding of mental incompetency was essential to appointment of guardian for testatrix, did not constitute prejudicial error. Probate Code, § 1460.

9. Wills ⚿384

In will contest, introduction of testimony of proponent that during Easter holiday some three months after testatrix' death proponent visited her grave and found no decorations of the grave other than those which he and his mother had provided did not constitute prejudicial error.

◆

Joe E. Greene, Dinuba, H. A. Savage, Fresno, for appellants.

Rae B. Carter, Fresno, L. M. Linneman, Dos Palos, Linneman & Burgess, Dos Palos, for respondent.

SCHAUER, Justice.

[1] Contestants in this will contest appeal from a judgment entered on a verdict in favor of proponent. For the reasons which hereinafter appear, we have concluded that the judgment should be affirmed. Contestants also attempt to appeal from an order denying their motion for a new trial; such order is not appealable (see Prob.Code, § 1240; In re Estate of Anderson (1938), 29 Cal.App.2d 637, 641, 85 P.2d 212; In re Estate of Frazer (1941), 43 Cal.App.2d 324, 327-328, 110 P.2d 702; McNamara v. Emmons (1939), 36 Cal.App.2d 199, 208, 97 P.2d 503) and the attempted appeal therefrom will be dismissed.

The decedent, Mrs. Virginia Estelline Dopkins, died on December 23, 1946, leaving a will executed some five months earlier in which the proponent herein, Lyle B. Oliver, is named executor and sole beneficiary. Mrs. Dopkins was a widow, left an estate of about $40,000 and no issue, and was over ninety years of age at her death. Contestants are divided into two groups: the first group are collateral relatives of Mrs. Dopkins' husband, who died in 1932; the second group are alleged to be collateral relatives, in the fifth degree, of Mrs. Dopkins herself.

Opposition to probate of the will was based upon the grounds, first, that decedent was not of sound mind when she executed the will, and, second, that the will was procured by the undue influence of proponent, Lyle B. Oliver. The jury found in favor of proponent on each issue.

The appeal is presented on a clerk's transcript, and a settled statement (Rules on Appeal, Rule 7(a) and (d)), which includes certain of the instructions which were given and others which were refused. In addition, upon application of the contestants to the District Court of Appeal, while this matter was pending before that court, the record was augmented by a reporter's transcript of the testimony of Lyle B. Oliver at the trial herein and of all the instructions given by the court (Rules on Appeal, Rule 12(a)).

As grounds requiring reversal of the judgment, contestants urge that the trial court erred in the refusing and the giving of various instructions, in making a certain comment in the presence of the jury when sustaining proponent's objection to a question propounded by counsel for contestants, and in the admission of certain evidence over contestants' objections.

From the record before us, it appears that Mrs. Dopkins and the proponent, a resident of Reedley, Fresno County, who was born in 1902, had been neighbors and friends since his childhood. In 1945 Mrs. Dopkins moved from her ranch home about three and one-half miles south of Reedley, to a home which she purchased in Reedley. Thereafter proponent under her direction and supervision assisted her in such matters as buying groceries, depositing her bank checks, and paying her bills. Purchases made for her were paid for with her money. Early in July, 1946, Mrs. Dopkins became ill and on the 13th day of that month she was taken to the hospital in Reedley, where she remained for over two weeks. Proponent testified that theretofore she had been "pretty feeble physically; she could not go to town or look after her physical needs alone"; that during her first three or four days in the hospital he remained with her continuously, leaving "only to eat"; that "I was there all night, I could not get a night nurse, and I figured that [it] would be better if I stayed there because the other nurses were so terribly overburdened that they could not come in and see her often enough, so [at the request of the head nurse] I stayed there"; that "during a portion of that time she was somewhat delirious."

On July 24 or 25, while Mrs. Dopkins was at the hospital, she requested proponent to "get a good lawyer and be sure you don't get Joe Greene [one of counsel for contestants herein]" for the purpose of drawing a will for her. Proponent testified that he "told her that I had been told that Mr. [Rae B.] Carter was a good attorney," that he had not previously known Mr. Carter. According to the settled statement that Mrs. Dopkins thereupon instructed proponent to interview Mr. Carter at the latter's office in Fresno and direct him "to draw a will for her, appointing Oliver executor thereof, and leaving her entire estate to him; [and] * * * direct Mr. Carter to take such proceedings as might be required in order to have Oliver appointed the guardian of her person and estate upon the ground that she was physically incapable of caring for her property." Proponent testified that at the time of the above discussion, Mrs. Dopkins "had recovered to where she was rational at all times." Proponent Oliver called at Carter's office on the same or the following day "and communicated to him the desires of Mrs. Dopkins in the above connections." Oliver testified that on several other occasions Mrs. Dopkins had asked to have such a will drawn "and with practically the same information in it"; that he had "tried * * * to get her to change that" and provide for others in her will; that he "did not try to influence her * * * at all * * * in the making of the will as it was made"; that "Whenever anyone tried to steer her, then she would back up; anyhow, I could not do anything with her * * * Very seldom I could ever get her to do anything she did not want to."

On July 30, 1946, Mrs. Dopkins was discharged from the hospital and taken to proponent's home in Reedley, where she was cared for by a practical nurse procured by proponent. Proponent testified that she was taken to his home rather than her own because the latter was then being redecorated. About noon of the same day, July 30, "pursuant to arrangements made with Mrs. Dopkins through Lyle B. Oliver," Mr. Carter met with Mrs. Dopkins at Oliver's home to deliver the will and a request for Appointment of Guardian. Oliver introduced Mr. Carter to Mrs. Dopkins and then left the room and returned to the hospital to pick up certain of Mrs. Dopkins' personal belongings which had been left there. During proponent's absence Mr. Carter "explained to Mrs. Dopkins the effect of the request and the appointment of a guardian, and he also discussed with her the terms and provisions contained in the will and the legal effect thereof. She thereupon signed the documents after approving the contents thereof and after obtaining attesting witnesses who witnessed the execution of the will." The attesting witnesses were Mr. Carter and Mr. C. H. Green, a neighbor and acquaintance of Mrs. Dopkins, who had been "called in" by proponent. Mr. Carter testified that during his discussion with Mrs. Dopkins she stated "that it was her chief concern to see to it that Lyle Oliver got her property, * * * that she had certain relatives, but that they had done nothing for her and that she wished to make no provision for any of them, and that Lyle Oliver had been very kind to her, and that she had done all for her relatives that she felt they were entitled to"; that he then asked her what property she had and she described it in detail; that he explained to her that under the terms of the will "no relatives would get anything, and that Mrs. Dopkins stated she wanted to be very sure of that; that she mentioned certain of the Dopkins family by name, and remarked that it appeared to her that they were merely awaiting her death."

On July 31, 1946, a petition was filed requesting the appointment of proponent as guardian of the person and estate of Mrs. Dopkins, on the ground of the latter's physical incapacity. On August 9, 1946, the court made its order appointing proponent as her guardian; the order expressly specifies that the appointment was based upon the ward's physical incapacity. Thereafter, upon completion of the redecorating work, "Mrs. Dopkins removed to her own home in Reedley" where proponent and the practical nurse continued caring for her until her death on December 23, 1946.

Concerning Mrs. Dopkins' mental capacity and the claim that proponent influenced her, the settled statement relates among other things that "The testimony of all witnesses disclosed that the decedent directed all her business operations and affairs, continuously, both before and after the execution of the will, and that by virtue of such direction her properties were steadily increased and enhanced in value.

"While the testimony showed certain personal eccentricities on the part of the decedent, no witness testified that in his or her opinion the decedent lacked capacity to understand the nature of the testamentary act; to recall her property, or to remember the relationship of persons related to her.

"There was no testimony whatever that beneficiary under the will at any time exerted any influence over the decedent, or exerted any pressure upon her mind concerning the disposition of her property. * * *

"Mrs. Korn, the nurse who began her attendance upon Mrs. Dopkins the day of the execution of the will, and continued her attendance upon her until her death, testified that * * * Mrs. Dopkins was a very strong-minded person, and would be extremely hard to influence; that during her attendance upon her from time to time Mrs. Dopkins mentioned various relatives, and the vicinity in which they lived, and subsequent to the date upon which the will in question was executed, Mrs. Dopkins referred to it a number of times in her conversations, and indicated that she was fully aware of its terms and the fact that no provision was made therein for her relatives. * * *

"C. H. Green, who was one of the subscribing witnesses to the will, testified that in his opinion Mrs. Dopkins was fully aware who her relatives were at the time she executed the will, and what property she owned and possessed, and that she discussed both of these matters and stated that she wanted her property disposed of in the manner provided for in the will. That to him she appeared to know and to be aware of all her property and exactly what she wanted to do with it."

Concerning his own associations with decedent prior to the making of the will, proponent testified that he had consulted with her concerning her business matters for approximately one year prior to her move to Reedley in 1945; that at or near the time of her move to Reedley Mrs. Dopkins sold her ranch, on which she had been residing, to proponent's father, but that she had not consulted proponent about the matter, "The deal was actually made before I knew it." Shortly thereafter Mrs. Dopkins lent $10,000 for one year to proponent and to his father to be used to "level" the former Dopkins ranch; at the end of the year when repayment of the loan was offered Mrs. Dopkins stated that "she did not want the money; she wanted to keep it working for her" and continue receiving interest thereon, and "that is what was finally done"; proponent "was worth around $50,000" at the time of the loan, and so informed Mrs. Dopkins.

Contestants' first contention is that the court erred in refusing to give their following requested instruction:

"You are instructed that where a confidential relationship exists between the testatrix and the beneficiary under the will, coupled with activity on the part of the beneficiary in the preparation of the will, and is profiting unduly thereby, casts upon the proponent the burden of showing that the will was not the product of such imposition and you are further instructed that the mere fact that the will was executed out of the presence of proponent does not in itself refute the charge of imposition or presumption. It is a circumstance, however, to be considered by you."

The quoted instruction appears to be an attempted translation of the rule set forth in Re Estate of Graves (1927), 202 Cal. 258, 262, 259 P. 935, 936 (see also In re Estate of Yale (1931), 214 Cal. 115, 122–123, 4 P.2d 153; In re Estate of Teel (1944), 25 Cal.2d 520, 527–528, 154 P.2d 384; In re Estate of Miller (1936), 16 Cal.App.2d 154, 166–168, 60 P.2d 498; In re Estate of Eakle (1939), 33 Cal.App.2d 379, 382, 91 P.2d 954; In re Estate of Anderson (1938), supra, 29 Cal.App.2d 637, 640, 85 P.2d 212; In re Estate of Abert (1949), 91 Cal.App. 2d 50, 58, 204 P.2d 347) that "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to *impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination.*" (Italics added.)

[2-4] Although it is apparent from the record as summarized hereinabove that there is some evidence of the factors which will raise a rebuttable presumption of undue influence; i. e., (1) a confidential relationship; (2) decedent's condition such as to permit of a subversion of her freedom of will; (3) activity in procuring the instrument to be executed; and (4) profiting by the will, it is likewise apparent that the instruction which was refused is uncertain and confusing and that it fails to set forth any rule of law which conceivably could have affected the verdict favorably to contestants. Moreover, such instruction obviously suggests to the jury as a fact, that there was "such imposition" by the beneficiary under the will, and is therefore erroneous in invading the province of the jury. (See Waack v. Maxwell Hardware Co. (1930), 210 Cal. 636, 641–643, 292 P. 966; Collins v. Hodgson (1935), 5 Cal. App.2d 366, 371, 42 P.2d 700.) On a technical detail of the law such as was

apparently attempted to be explained in the refused instruction the appellants were bound to request a proper and intelligible instruction if the refusal to instruct is to constitute ground for reversing the judgment; as declared in Nelson v. Southern Pacific Co. (1937), 8 Cal.2d 648, 653, 67 P.2d 682, 685, "it has been frequently held that where instructions are offered which cannot properly be given without modification the court may refuse to give them. [Citations.]" (See also Hart v. Farris (1933), 218 Cal. 69, 75, 21 P.2d 432; Jones v. Bayley (1942), 49 Cal.App.2d 647, 656, 122 P.2d 293.) Actually, the record shows that here proponent *did* present evidence of volition, the question of undue influence *was* determined by the jury, and the rule of the Graves case was not violated.

[5] Contestants next urge that the court erred in giving three instructions requested by proponent relating to undue influence.[1] Although contestants concede that each of the three instructions "by itself was all right," they contend that "In substance, the Court singled out the several necessary elements giving rise to the presumption of undue influence, and stated and emphasized in effect that a confidential relationship of itself did not give rise to a presumption of undue influence; that profiting unduly by the will did not give rise to such undue influence; that active procuration of the execution of the will did not give rise to this presumption even where there was opportunity. The Court in giving these instructions really told the jury that none of the essential elements of the rule gave rise to the presumption of undue influence." The answer to contestants' complaint is again readily found in the instructions themselves, which make no mention of the "elements" of profiting unduly and of active procuration, but are confined to a discussion of confidential relationship and of "interest and opportunity." It is obvious, therefore, that none of the three instructions singly, nor do all of them together, purport to cover all the law on the subject or to negative the rule for which contestants contend. It follows that contestants' position on this point is without merit.

[6, 7] Contestants next assert error in refusing to give three of their requested

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[1] Such instructions read as follows:

No. 14: "In order to establish that a will has been executed as a result of undue influence, it is necessary to show not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will, which he executes, is not the expression of his own desires. The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made. Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment."

No. 15: "You are instructed that there is no legal suspicion of undue influence arising from the existence of a relationship which is affectionate and confidential; and you are further instructed and advised that the existence of such a relationship, if you believe there was one, does not in and of itself impose upon Lyle B. Oliver the necessity of assuming the burden of proof that he had not unduly influenced Virginia Estelline Dopkins in the making of her will."

No. 17. "You may believe from the evidence in this case that a friendly and confidential relation existed between Virginia Estelline Dopkins and Lyle B. Oliver, but you are instructed that no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such friendly and confidential relation alone. Assuming that you believe it to be the fact that the relation between Virginia Estelline Dopkins on the one hand, and Lyle B. Oliver on the other hand, was affectionate and confidential, and that Lyle B. Oliver would and did have a general influence over said Virginia Estelline Dopkins, proceeding from such relation, you are instructed that the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by Lyle B. Oliver."

instructions, the first of which reads as follows:

"You are instructed that the judgment of August 9, 1946, in the Guardianship proceeding of Mrs. D. H. Dopkins was evidence of the mental condition of Mrs. D. H. Dopkins on that date, and would justify an inference that Mrs. D. H. Dopkins lacked testamentary capacity at that time." Each of the other two of such requested instructions stated, among other things, that the judgment of August 9, 1946, appointing a guardian for Mrs. Dopkins, could only have been entered "providing the court found that she was at the time of said judgment an 'incompetent person' or 'incompetent' or 'mentally incompetent,' * * * The incompetency above mentioned must be understood to mean a mental inability rather than a physical inability."

As already mentioned, the appointment of the guardian was sought and was ordered by the court upon the expressly delimited basis of physical incapacity of Mrs. Dopkins. Contestants urge that their contention that they were entitled to the three requested instructions to the effect that such appointment connoted mental inability is supported by Matter of Coburn (1913), 165 Cal. 202, 212, 131 P. 352; Guardianship of McConnell's Estate, (1938), 26 Cal.App.2d 102, 104–105, 78 P.2d 1043; In re Estate of Krause (1945), 71 Cal.App.2d 719, 725, 163 P.2d 505. The guardian of Mrs. Dopkins was presumably appointed under the provisions of section 1460 of the Probate Code, formerly found in section 1767 of the Code of Civil Procedure.[2] It is true that in Matter of Coburn, supra, the court stated that the inability upon which such guardianship proceedings are based [165 Cal. 202, 131 P. 356] "must be understood to mean a mental, rather than a physical, inability." Nevertheless, the appointment in the Coburn case was based upon express allegations in the petition, found by the court to be true, that the ward was "mentally incompetent to manage his said estate. * * * and that he is, by reason of old age and physical disability and weakness of mind, unable to take care of himself and manage his property." (Page 207 of 165 Cal., page 354 of 131 P.) In Guardianship of McConnell's Estate, supra, there was both testimony and a court finding of "senile mental deterioration" (page 105 of 26 Cal.App.2d, page 1044 of 78 P.2d); and in Re Estate of Krause, supra, although the opinion declares that (page 725 of 71 Cal.App.2d, page 508 of 163 P.2d) "The judgment of May 17th in the guardianship proceeding was evidence of the mental condition of Mr. Krause on that date", the allegations, evidence, or findings upon which such judgment was based are not indicated.

Moreover, as pointed out by proponent, the Coburn case holding was based in part upon the provisions of then section 1763 of the Code of Civil Procedure to the effect that "When it is represented to the superior court * * * upon verified petition * * * that any person is insane, or from any cause *mentally* incompetent to manage his property," (italics added) notice should be given, a hearing held, etc. When in 1931 the provisions of section 1763 of the procedural code were recast and enacted into section 1461 of the Probate Code the adjective "mentally" was omitted, and thenceforth, proponent urges, the petition has needed only to allege "that a person is insane or incompetent," etc. But in this case it is unnecessary for us to and we do not determine whether the Legislature intended to obviate, and has in fact dispensed with, the requirement that mental incompetency be shown. Even if we assume (and we expressly declare that we intend no implication one way or the other) that the court in appointing a guardian for Mrs. Dopkins for physical inability only may, under the declaration of the Coburn case, have exceeded its power (or its jurisdiction), nevertheless the contestants may not claim error—and certainly not prejudicial error—in the refusal of the trial court in the instant case to instruct the jury that the appointment of the guardian, made on the expressly limited ground of physical inability, connoted a mental inability. Regardless of whether the guardian was properly or improperly appointed the fact is undisputed that the appointment, for whatever it was worth, was based solely on the allegation and finding of *physical* inability; hence, obviously, it is not evidence of mental incapacity. (See also holdings in Re Estate of Johnson (1927), 200 Cal. 299, 305, 252 P. 1049; In re Estate of Worrall (1942), 53 Cal.App.2d 243, 246, 127 P.2d 593; and In re Estate of Powers (1947), 81 Cal.App.2d 480, 483-484, 184 P.2d 319, that an adjudication of incompetency in a guardianship proceeding is not applicable to testamentary capacity and does not constitute prima facie evidence of testamentary incapacity.)

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[2] Section 1460 of the Probate Code reads as follows: "Any superior court to which application is made * * * may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person. As used in this division of this code, the phrase 'incompetent person', 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

[8] Contestants' next contention concerns a comment made by the trial court in the jury's presence. On cross-examination of proponent, counsel for contestants read aloud the provisions of section 1460 of the Probate Code, discussed hereinabove, and asked proponent whether the attorney, Mr. Rae Carter, had read the same provisions to him prior to his appointment as guardian of Mrs. Dopkins. The following thereupon ensued:

"A. He did not read that to me.

"Q. You knew about it, though, didn't you? You knew she had to be declared mentally incompetent?

"Mr. Linneman [counsel for proponent]: Just a moment, your Honor, please, I don't think that is the fact, what counsel refers to, and we object to that on that ground. I don't think that is the law, and furthermore it is asking for the conclusion of the witness concerning a matter of law.

"The Court: I don't think it is the law, either, and I will sustain the objection upon that ground."

Contestants assert that by the quoted remark the court declared it "did not believe a Code Section to be the law," and thereby rebuked counsel for contestants and put them "in the lights that they were not clearly reading the law." It is clear, however, that by the quoted statement the court meant that it did not believe a declaration or finding of mental incompetency was essential to the appointment of a guardian for Mrs. Dopkins. That expression of belief, it is obvious, was but an incidental reaffirmation of the view formally evidenced by the order appointing the guardian, hereinabove discussed. Whether or not the court's belief was legally correct is not a question material to the decision of the issues before us. The expression was incident to ruling upon a proposition of law raised by the question and the objection thereto. For reasons already fully discussed the ruling was correct and the court's comment in making the ruling does not in the circumstances, upon any view of the matter, constitute prejudicial error.

[9] Finally, contestants urge that the court erred in permitting proponent, over objection by contestants, to testify that during Easter holidays, some three months after Mrs. Dopkins' death, he visited her grave to decorate it and found no decorations of the grave other than those which he and his mother provided. Although this evidence of events occurring subsequent to testatrix' death may not be wholly relevant or at all material to the issues in this case, it was at worst (from contestants' standpoint) but cumulative of testimony set out hereinabove concerning the regard and concern felt by proponent for Mrs. Dopkins and the lack of such sentiment on the part of contestants, and cannot be held to constitute prejudicial error.

The judgment is affirmed and the attempted appeal from the order denying motion for a new trial is dismissed.

GIBSON, C. J., and EDMONDS, TRAYNOR and SPENCE, JJ., concur.

34 Cal.2d 595

CITY OF GRASS VALLEY v. WALKINSHAW.

S. F. 18028.

Supreme Court of California, in Bank.
Dec. 28, 1949.

Original proceeding by City of Grass Valley against J. L. Walkinshaw, Auditor of the City of Grass Valley, for a writ of mandate to compel respondent to extend on property tax rolls of City a special levy to discharge payments of interest and principal on bonded indebtedness.

The Supreme Court, Shenk, J., held that the bonded indebtedness was duly authorized, and that under statutes taxing power existed to levy taxes to pay the indebtedness, and issued the writ.

Schauer and Edmonds, JJ., dissented.

1. Municipal corporations 🔑57

Where city accepts constitutional privilege of autonomous rule, it has all powers over municipal affairs otherwise lawfully exercised, subject only to explicit limitations contained in its charter. Const. art. 11, §§ 6, 8, as amended in 1914.

2. Municipal corporations 🔑58

When municipal corporation is governed by home rule charter which is an instrument of limitation on exercise of power over all municipal affairs which city is assumed to possess, city derives its power from charter and the enumeration of powers does not constitute an exclusion or limitation on city's powers. Const. art. 11, §§ 6, 8, as amended in 1914.

3. Municipal corporations 🔑58, 64

In respect to municipal affairs a city under a home rule charter is not subject to general law except as the charter may provide, and in construing the charter restrictions on exercise of municipal power will not be implied. Const. art. 11, §§ 6, 8, as amended in 1914.

4. Municipal corporations 🔑267, 326, 962

Levy of taxes for city purposes, collection, treatment and disposal of city sewage, and making of contracts therefor are municipal affairs governed by city's charter, and a construction in favor of exercise of those powers and against existence of any limitation or restriction which is not expressly stated in charter will be followed. Const. art. 11, §§ 6, 8, as amended in 1914.

5. Municipal corporations 🔑964

The power to tax for purpose of discharging authorized bonded indebtedness is a necessary accompaniment of power to contract the indebtedness.

6. Municipal corporations 🔑956(2), 964

Where electors of city of Grass Valley under home rule charter approved bonds for construction of sewage system under section providing taxes required to be levied and collected for payment of bonds would be in addition to all other taxes levied for municipal purposes, and city could meet obligation only through taxation, power to tax was an ingredient of power to contract, and provision in charter limiting property tax levied upon all realty and personalty to 75 cents on every $100 assessed valuation was not applicable. St.1921, p. 1889, §§ 2(i, j), 4; Const. art. 11, §§ 6, 8, as amended in 1914.

7. Municipal corporations 🔑956(2)

Where charter provision in home rule charter of city of Grass Valley referred to city's power to levy and collect ad valorem taxes in connection with issuance of bonded indebtedness, another provision of charter limiting property tax to be levied by city council upon all realty and personalty to 75 cents on every $100 assessed valuation of such property did not limit power to tax specially to discharge bonded indebtedness. St.1921, p. 1889, §§ 2(i, j), 4; Const. art. 11, §§ 6, 8, as amended in 1914.

8. Municipal corporations 🔑964

When a municipality has authority to contract an extraordinary debt by issuance of negotiable securities, power to levy taxes sufficient to meet obligation is conclusively deemed to exist unless law manifests a contrary intention.

9. Municipal corporations 🔑956(2)

When a municipality has authority to contract an extraordinary debt by issuance of negotiable securities, power to tax is ingredient of power to contract, as the obligation can be met only through instrumentality of taxation, and where power to issue bond carries with it authority to levy taxes, taxing power is not affected by tax rate limitation in charter which would render performance of duty impossible.

10. Municipal corporations ⚷956(2)

Where one provision in home rule charter of Grass Valley permitted city to contract indebtedness and issue bonds with consent of qualified voters, and another provision limited property tax to be levied upon all realty and personalty, latter provision was intended to curb extravagance in exercise of discretionary power to tax for general municipal purposes, and was not intended to prevent exercise of taxing power for purpose of discharging a bonded indebtedness duly authorized by electors. St.1921, p. 1889, §§ 2(i, j), 4; Const. art. 11, §§ 6, 8, as amended in 1914.

11. Municipal corporations ⚷911

In determining whether a city has power to issue bonds for necessary public improvements authorized by electorate under statute, court will give due weight to fact that city acted in conformity with a construction favorable to the exercise of power for period of 25 years. St.1921, p. 1889, §§ 2(i, j), 4; Const. art. 11, §§ 6, 8, as amended in 1914.

12. Mandamus ⚷113

Where city official refused to perform his official duty by extending a special levy on city's tax rolls, a writ of mandate was appropriate remedy to compel performance of his duty. Code Civ.Proc. § 1085.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for petitioner.

William J. Cassettari, Grass Valley, for respondent.

SHENK, Justice.

In this proceeding the petitioner, City of Grass Valley, seeks the writ of mandate to compel the respondent, its auditor, to extend on the city's property tax rolls, in addition to the tax for general municipal purposes, a special levy of 63 cents to discharge the 1950 payments of interest and principal on bonded indebtedness. The controversy is submitted on an agreed statement of the case pursuant to sections 1138–1140 of the Code of Civil Procedure.

In 1921 the petitioner, then a city of the sixth class, adopted a freeholders charter (Stats.1921, p. 1889) and thereby accepted the privilege of autonomous rule offered by sections 6 and 8 of Article XI of the state constitution as amended in 1914.

Section 2(i) of the charter refers to the city's power to levy and collect ad valorem taxes "subject to the limitations hereinafter imposed."

Section 2(j) prohibits the contracting of indebtedness in excess of $5000 except with the consent of two-thirds of the qualified electors voting thereon and requires bonds to be issued therefor. The following proviso appears: "Provided, that in the procedure for the creation and issuance for such bonded indebtedness the general laws of the State of California in force at the time such proceedings are taken, shall be observed and followed."

Section 4 of the charter provides the limitation (referred to in section 2(i)) on the "property tax, to be levied by the City Council upon all property, real and personal, within said City at 12 o'clock M., of the first Monday in March of each year, which may equal but shall never exceed seventy-five (75) cents on every one hundred dollars, assessed valuation of such property."

The present assessed valuation of property in the City of Grass Valley is $3,437,790. The 75 cent rate, levied thereon, will raise $25,783.42. The whole of this amount is required for general municipal purposes.

The Bond Act of 1901 (Stats.1901, p. 27, as amended) authorizes a municipal corporation to incur bonded indebtedness to pay the cost of a municipal improvement where the expenditure would be too great to be paid out of its ordinary annual income and revenue. The act provides the procedure for the creation and issuance of bonds to meet the cost of such improvements. Section 7 empowers the city, at the time of fixing the general tax rate, to levy and collect a sufficient tax to meet the current payments of bond interest and principal. The section states that the "taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes * * *."

In 1923, pursuant to section 2(j) of the charter and the authority of the electors, the city followed the provisions of the 1901 Bond Act in creating and issuing a bonded indebtedness of $100,000 to meet the cost of street improvements. In conformity with the statutory provisions periodic interest and principal payments on the bonds were made by the levy in the years 1924–1948 of a special tax of 55 cents in addition to the 75 cent charter rate.

In June 1949 the electors of the city duly authorized a bonded indebtedness of $398,000 to meet the cost of necessary sanitary improvements, including the acquisition of lands and easements, and the construction of a sewage collection, outfall and treatment works system. On July 1, 1949, the city issued 398 bonds of $1000 denomination bearing interest of not over 2¾ per cent, and maturing in annual amounts varying from $10,000 to $18,000 through the year 1980. The city council has levied the 63 cent special tax to meet the interest and principal payments to fall due the first year, but the respondent auditor has refused to extend the special levy on the tax rolls. Contracts have been let for the construction of the improvements. The bonds have been sold but remain undelivered pending the outcome of the present controversy.

The respondent contends that the 75 cent charter rate is a limitation for all requirements, including the discharge of the bonded indebtedness created pursuant to section 2(j) of the Charter and the 1901 Bond Act. He seeks support for his position in the language of sections 2(i) and 4 of the charter providing the 75 cent rate limitation and of section 2(j) incorporating the Bond Act procedure for the creation and issuance of the bonds. He argues that since the language of section 2(j) makes no specific reference to a requirement for the levy of a special tax to meet payments on the bonds, the charter limitation controls and restricts the rate which may be levied for both general and special purposes.

[1–4] Established law governing the exercise of municipal powers under a home rule charter and principles of construction applicable to charter provisions require the rejection of the respondent's contentions. He has overlooked the controlling principle that by accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter. The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 521–522, 525, 95 P.2d 138, and cases cited; City of Oakland v. Williams, 15 Cal.2d 542, 550, 103 P.2d 168; City and County of San Francisco v. Boyd, 17 Cal.2d 606, 617–618, 110 P.2d 1036; Kennedy v. Ross, 28 Cal.2d 569, 575, 170 P.2d 904; Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1. Thus in respect to municipal affairs the city is not subject to general law except as the charter may provide. Heilbron v. Sumner, 186 Cal. 648, 650, 200 P. 409; Muehleisen v. Forward, 4 Cal.2d 17, 19, 46 P.2d 969. As recognized in the West Coast Advertising case, the levy of taxes for city purposes is a municipal affair; the collection, treatment and disposal of city sewage and the making of contracts therefor are likewise municipal affairs, Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232, 159 P. 600, and neither may be held to be circumscribed except as expressly limited by the charter provisions. All rules of statutory construction as applied to charter provisions, Braun, Bryant & Austin v. McGuire, 201 Cal. 134, 143, 255 P. 808; Hartford Acc. etc. Co. v. City of Tulare, 30 Cal.2d 832, 835, 186 P.2d 121, are subordinate to this controlling principle. The former guide—that municipalities have only the powers conferred and those necessarily incident thereto, City and County of

San Francisco v. Boyle, 195 Cal. 426, 233 P. 965—is inapplicable. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.

The question then is whether the exercise of the power which is the subject-matter of section 2(j) of the charter is to be deemed limited or controlled by the provisions of sections 2(i) and 4.

Section 2(i) deals with the general taxing power of the city, which is "subject to the limitations hereinafter imposed." Section 4 states the limitation, namely, that such tax "may equal but shall never exceed" a 75 cent rate.

[5, 6] Section 2(j) treats of the power to borrow money, and limits contracts of indebtedness to $5000 except with the consent of two-thirds of the electors of the city. Bonds are required to meet the cost of the duly authorized greater indebtedness, the procedure for the creation and issuance thereof to be according to general law. There is in this section no language expressly withholding any existing power to levy taxes to discharge the bonded indebtedness. Nor is there in the tax limitation of section 4 a specific inclusion of an existing power to levy such special tax. As will be seen the power to tax for the purpose of discharging authorized bonded indebtedness is a necessary accompaniment of the power to contract the indebtedness. In the absence of specific allusion to that subject-matter elsewhere in the charter, all the restrictions or limitations upon the exercise of the power to contract a bonded indebtedness including the requirement to tax to discharge it must be found in section 2(j). Thus sections 2(i) and 4 on the one hand, and section 2(j) on the other, treat of two distinct powers. The first must be deemed to have reference to the taxing power for general purposes; and the second to the power to tax for the municipal improvements as well as the authority to contract therefor. Sections 2(i) and 4 may not impose by implication a limitation on the separately treated power to contract an indebtedness in excess of $5000, which specified amount the framers deemed was the maximum which could be covered by the general tax rate.

[7] Nevertheless the respondent purports to find in the language of section 2(j), adopting the procedure of the general law in creating and issuing the bonds, a limitation on any existing power to levy taxes to discharge an authorized bonded indebtedness. He says that the reference to procedure in the creation and issuance of the bonds precludes a holding that the method of payment required by section 7 of the Bond Act was adopted. The effect claimed would leave incomplete the provision for the bonded indebtedness. In such case the direct reference to the general law is deemed sufficient to include the complete scheme. Muehleisen v. Forward, supra, 4 Cal.2d at page 20, 46 P.2d 969. However, since the power to tax specially to discharge the bonded indebtedness exists independently of the provision in the general law, that power may be exercised unless the language of section 2(j) expressly prohibits it.

[8, 9] The duly conferred authority to create and issue bonds for the construction of the authorized sanitary improvements not only bestowed the power to levy a special tax to discharge the bonded indebtedness but made it the duty of the city to exercise the taxing power to that end. It has been recognized that when the municipality has authority to contract an extraordinary debt by the issuance of negotiable securities, the power to levy taxes sufficient to meet the obligation is conclusively deemed to exist unless the law (here the charter) clearly manifests a contrary intention. The power to tax is necessarily an ingredient of the power to contract, since the obligation can be met only through the instrumentality of taxation. The power so to tax is not implied but is express since it is a duty growing

out of the authority to contract. The power to do the thing carries with it the authority to use the necessary means to accomplish it, and is not affected by a charter tax limitation. United States v. New Orleans, 98 U.S. 381, 393-394, 395, 25 L.Ed. 225; Ralls County Court v. United States, 105 U.S. 733, 735-736, 26 L.Ed. 1220, and cases cited; Quincy v. Jackson, 113 U.S. 332, 337-338, 5 S.Ct. 544, 28 L.Ed. 1001, and cases cited; Dutton v. City of Aurora, 114 Ill. 138, 28 N.E. 461, 462; Nalle v. City of Austin, 85 Tex. 520, 22 S.W. 668, 673, 960. No case presented or discovered denies this result in the absence of restriction expressly designed to withhold the power or place a limitation on its exercise. On the contrary, it has been indicated in this state that the discharge of that duty may not indirectly be repudiated by provision in the charter for a limitation of the tax rate which would render performance of the duty impossible. Wilkinson v. Lund, 102 Cal.App. 767, 773, 283 P. 385. The provisions of the charter do not expressly withhold or limit the exercise of the power, and in the absence of a limiting provision the authority to contract the bonded indebtedness includes authority to exercise the taxing power by levying a special tax to discharge it.

[10, 11] If it may be said that the charter provisions seem to be conflicting, it does not follow that they are irreconcilable. Full force and effect may be given to both provisions when each is seen to have a different and distinct purpose. Assuming ambiguity, a construction which would prevent the city from issuing bonds for necessary public improvements authorized by the electorate would be unreasonable. The city adopted a construction favorable to the exercise of the power by the issuance of the 1923 bonds, and its interpretation was a proper one. The fact that the city has acted in conformity with this construction for a period of some twenty-five years is entitled to due weight. Reuter v. Board of Supervisors, 220 Cal. 314, 323, 30 P.2d 417. The effect of the contemporaneous construction is that the 75 cent tax limitation of section 4 of the Charter was intended to curb extravagance in the exercise of the discretionary power to tax for general municipal purposes but was not intended to prevent the exercise of the taxing power for the purpose of discharging a bonded indebtedness duly authorized by the electorate pursuant to section 2(j) of the charter.

[12] The taxing power sought to be exercised exists. There is no express limitation upon its exercise except that the bonded indebtedness must be duly authorized. The electorate, legislative body, and taxpayers of the city have governed themselves in accord with the existence of the power and without the tax limitation invoked by the respondent. The writ of mandate is appropriate to compel performance of the respondent's official duty, sec. 1085, Code of Civ.Proc.; and the petitioner is entitled to the relief sought.

Let the peremptory writ issue.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

The charter of Grass Valley squarely and explicitly provides that the "property tax * * * may equal but shall never exceed seventy-five (75) cents on every one hundred dollars, assessed valuation of * * * property." That charter has not been amended by any lawful means but now this court sustains the city council in imposing on the people of Grass Valley a property tax rate of $1.38 on every one hundred dollars of assessed valuation.

The language of the charter is clear and unequivocal; such charter is the basic governing law of the city; the residents of that city are entitled to have the law upheld and to expect and demand that this court shall enforce it. None of the arguments for the majority decision, nor all of them together, can escape the fact that the effect of that decision—indeed, its sole object—is to uphold a property tax which *does exceed* "seventy-five (75) cents on every one hundred dollars". However desirable that result may appear to the majority justices it is not sound law; and the indulgence in so straining law to reach an end does not in my view constitute desirable judicial practice.

By the terms of the charter and by prior decisions of this court, hereinafter cited, it is unescapable that the sixty-three cent tax levied by the city council for the purpose of meeting principal and interest payments on the sanitary improvement bonds issued by the city was and is invalid because it was levied over and above, and in addition to, the maximum property tax rate set forth in the charter (Stats.1921, p. 1889). If we are to respect and uphold established law the peremptory writ sought by petitioner should be denied.

The provisions of the city charter which are pertinent to this controversy are found in sections 2 and 4 of Article I.[1]

At a special election called by the council and held in June, 1949, the city electors approved the incurring by the city of a bonded indebtedness of some $398,000 for the acquisition, construction, and completion of a city sewer system. The bond proceedings "were undertaken for the purpose of financing the cost of improvements for treating and disposing of the sanitary sewage of said City." The bonds were issued, in the denomination of $1,000 each, with maturity dates commencing on July 1, 1950, and extending through July 1, 1980. In September, 1949, the council fixed the "general tax rate for all City purposes for the year 1949–50," at the rate of seventy-five cents on each one hundred dollars of assessed valuation of property in the city and also levied on such property "a special tax at the rate of sixty-three" cents to meet the principal and interest payments falling due on the bonds in January and July, 1950.

As claimed plausible "authority" for the additional sixty-three cent rate the city relies upon subsection (j) of section 2, Article I, of the charter, and also upon section 7[2] of an Act of the Legislature which took effect on February 25, 1901 (Stats. 1901, p. 27, as amended, Deering's Gen.

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[1] Such provisions are as follows: "Sec. 2. The City shall have power: * * *

"(i) To levy and collect taxes upon any or all objects of taxation upon which a city may lay a tax in accordance with the Constitution and laws of this State, subject to the limitations hereinafter imposed.

"(j) To borrow money for any of the purposes for which the City is authorized to provide, and for the purpose of carrying out any of the powers granted to the City by this Charter, but shall not contract indebtedness on behalf of the City in excess of the sum of five thousand (5,000) dollars, without the consent of two-thirds of the qualified electors voting thereon, and to issue bonds therefor; Provided, that in the procedure for the creation and issuance for such bonded indebtedness the general laws of the State of California in force at the time such proceedings are taken, shall be observed and followed.

"(k) To do and perform any and all other acts and things appropriate to a municipal corporation which are not specifically forbidden by the Constitution or laws of this State, or which may be for the general welfare and good of the people of said City of Grass Valley, and no enumeration of powers in this Charter shall be taken to imply any limitation of the foregoing general grant of power. * * *

"Sec. 4. A property tax, to be levied by the City Council upon all property, real and personal, within said City at 12 o'clock M., on the first Monday in March of each year, which may equal but shall never exceed seventy-five (75) cents on every one hundred dollars, assessed valuation of such property."

[2] Section 7 reads as follows: "The legislative branch of said city * * * shall at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually each year until said bonds are paid, or until there shall be a sum in the treasury of said city * * * set apart for that purpose to meet all sums coming due for principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds as the same becomes due, and also such part of the principal thereof as shall become due before the proceeds of a tax levied at the time for making the next general tax levy can be made available for the payment of such principal. * * * *The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes*, and shall be collected at the time and in the same manner as other municipal taxes are collected, and be used for no other purpose than the payment of said bonds and accruing interest." (Italics added.)

Laws, Act 5178), and which has to do with the incurring of bonded indebtedness by cities, towns and municipal corporations for municipal improvements and regulating the acquisition, construction or completion thereof. The parties state that "the whole of said seventy-five (75) cent rate is necessary for general city purposes, and that City would be unable to finance the cost of any general City improvements unless section 7 of said 1901 Act is applicable to said City as a qualification of section 4 of Article I of said Charter."

The sale of the bonds has been "awarded" to "the highest responsible bidder therefor" and contracts have been let for the construction of the contemplated improvements but "the consideration for the sale of said bonds will not be received until and unless the City receives a favorable decision herein." It is shown that on a prior occasion, "pursuant to the authority granted at an election * * * in the year 1923, under the provisions of said 1901 Bond Act, the City issued * * * general obligation bonds * * * in the amount of $100,000.00 for street improvements." Such bonds matured in the years 1924 through 1948, and "a special tax separate and distinct from and in excess of the general City tax was levied in each of said years for the payment of the principal and interest of said bonds, and * * * in the fiscal years 1923–24 the amount of the special levy therefore was" fifty-five cents.

As declared in West Coast Advertising Co. v. San Francisco (1939), 14 Cal.2d 516, 521–522, 95 P.2d 138, 142, "It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. Stege v. City of Richmond, 194 Cal. 305, 228 P. 461; Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434 [126 A.L.R. 838]; Bank v. Bell, supra, [62 Cal.App. (1923) 320, 217 P. 538.] As stated in In re Galusha, 184 Cal. 697, at page 700, 195 P. 406, at page 407, 'The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, * * *.' Also in In re Nowak, 184 Cal. 701, 704, 195 P. 402, 403, it was said: 'The net result * * * is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. [Citing cases.]'

"The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution of complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly forbidden may be exercised by the municipality, and any limitations upon its exercise are those only which have been specified in the charter." (See also Adams v. Wolff (1948), 84 Cal.App.2d 435, 440–441, 190 P.2d 665.

The "city is not subject to general laws in matters concerning municipal affairs, except as the charter itself may provide." (Heilbron v. Sumner (1921), 186 Cal. 648, 650, 200 P. 409, 410.) "That street and sewer work in a municipality * * * are 'municipal affairs' within the meaning of the constitutional provision cannot be doubted." (Loop Lumber Co. v. Van Loben Sels (1916), 173 Cal. 228, 232, 159 P. 600, 602.) The "levy of taxes by a municipality for revenue purposes * * * is strictly a municipal affair. * * * [and] included within the special grant and privilege tendered by the constitutional amendment in 1914". (West Coast Advertising Co. v. San Francisco (1939), supra, 14 Cal. 2d at page 524, 95 P.2d at page 143.)

A charter provision is "subject to the same rules of interpretation as a statute.

If it be free from ambiguity no construction or interpretation is required or permissible, and it must be given no meaning other than its words import. 'It is a cardinal rule applicable to the interpretation of statutes that in order to ascertain the intent of the Legislature in enacting the same, recourse must first be had to the language of the statute itself, and that if the words of enactment given their ordinary and proper signification are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning.' People v. Stanley, 193 Cal. 428, 431, 225 P. 1, 2. In the construction of the instrument the office of the court 'is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.' Section 1858, Code Civ.Proc.; 23 Cal.Jur. 729." (Braun, Bryant & Austin v. McGuire (1927), 201 Cal. 134, 143, 255 P. 808, 811.) "Where there is a conflict between two provisions in a statute a specific or special provision controls over a general one [citations]." (Hartford Acc. etc. Co. v. City of Tulare (1947), 30 Cal.2d 832, 835, 186 P.2d 121, 123.)

The problem here is to determine, in conformity with the foregoing rules, whether the property tax limitation of seventy-five cents, expressed in section 4 of Article I of the city charter was intended by the electors who adopted the charter (Const., Art. XI, § 8, sub. (g)) to include taxes levied for the payment of principal and interest on bonded indebtedness contracted by the city and discussed in subsection (j) of section 2 of Article I of the charter. The city urges that the provision of subsection (j) "that in the *procedure* for the *creation* and *issuance* of such bonded indebtedness the general laws of the State of California in force at the time such proceedings are taken, shall be observed and followed," (italics added) authorizes and requires the city council, under section 7 of the Act of February 25, 1901 (quoted hereinabove), not only to levy and collect to meet the bond payments a property tax "in addition to all other taxes levied for municipal purposes" but to add such tax to the seventy-five cent maximum if the council finds it expedient so to do.

At the outset, the city relies upon Ex parte Lemon (1904), 143 Cal. 558, 77 P. 455, 65 L.R.A. 946; Ransome-Crummey Co. v. Bennett (1918), 177 Cal. 560, 563, 171 P. 304; and Richards v. Wheeler (1935), 10 Cal.App.2d 108, 51 P.2d 436, as supporting the proposition that a "provision of the general law incorporated into a charter has all of the force and effect of any other charter section." It appears, however, that in the Lemon and the Ransome-Crummey Co. cases the statutes in question had been made, in their entirety, a part of the city's organic law, and, as pointed out in West Coast Advertising Co. v. San Francisco (1939), supra, 14 Cal.2d 516, 522, 95 P.2d 138, 142, Richards v. Wheeler was apparently concerned with a charter framed as a specific grant of power "rather than with limitations upon recognized existing powers * * *." Where the charter adopts only a portion of a general law, or adopts a general law subject to reservations or provisos expressed in the charter, the general law controls only to the extent that it does not conflict with other charter provisions. (See Muehleisen v. Forward (1935), 4 Cal. 2d 17, 19-20, 46 P.2d 969, 970.)

Here it appears that the city of Grass Valley in its charter has in express language adopted only a portion of the general law relating to the incurring of bonded indebtedness for municipal improvements (Deering's Gen.Laws, Act. 5178), to wit, the *procedure* to be followed in the *creation* and the *issuance* of such bonds, and has neither expressly nor by any legally permissible implication adopted the provisions embodied in section 7 of the act, treating of the levying of a tax "in addition to all other taxes levied for municipal purposes" for the purpose of meeting bond principal and interest payments. Much less does the charter state that the express property tax limitation of seventy-five cents may be ignored, or does not apply to and include, property taxes which may be levied to pay the bonds. As declared in the Muehleisen case, *supra,* "It is impossible to hold that the proceedings under review were valid. The question is not of strict or liberal construction, nor is the case one of immaterial or unsubstantial departure from formal requirements. The charter provision is clear and requires no interpretation; and the requirements [concerning the recall of elective city officials] which were not followed are among the most important elements of the * * * system * * *."

The city urges that the tax limitation specified in section 4 of the charter applies only to "general" taxes levied for "general" municipal expenses, and that the meeting of bond payments for municipal improvements constitutes a "special" purpose warranting a "special" tax over and above the charter limitation. In support of such position the city relies upon a number of cases, arising both in California, and in other jurisdictions. Review of such cases reveals, however, that they were decided under charter provisions and statutes differing in both language and effect from those now before us.

Wilkinson v. Lund (1929), 102 Cal.App. 767, 774, 283 P. 385, concerned the validity of a tax limitation provision in a *county*, rather than a *city*, charter, and it was held that under the Constitution (Art. XI, § 7 ½, sub. 4) the taxation power of a county board of supervisors is controlled by general law rather than by the charter limitation; by contrast, the city charter now before us is controlling over general law. Myers v. Placerville (1870), 1 Cal.Unrep. Cas. 565, concerns the interpretation of acts of the state Legislature, rather than charter limitations which control over such acts. In People v. Rigney (1883), 63 Cal. 296, the question was whether taxes beyond a charter limitation were "authorized" by subsequent acts of the Legislature, which at that time controlled over charter provisions (see Bank v. Bell (1923), 62 Cal.App. 320, 324-325, 217 P. 538). American Co. v. City of Lakeport (1934), 220 Cal. 548, 32 P.2d 622; Los Angeles etc. Corp. v. City Council (1936), 18 Cal.App.2d 97, 100-102, 63 P.2d 326; and Federal Construction Co. v. Wold (1916), 30 Cal.App. 360, 361, 158 P. 340, had to do with constitutional (Art. XI, § 18) and statutory (Stats.1935, p. 1254) debt and expenditure limitations placed on cities, and held that such limitations did not apply to the mandatory, contingent, liability imposed upon cities by the Improvement Bond Act of 1915 (Stats.1915, p. 1441; Deering's Gen.Laws, Act 8209 to pay into a tax redemption fund the amount of the delinquent assessment and interest against lands sold for default in payment thereof and purchased by the city. By contrast, there is no mandatory liability upon the city under the charter here involved to levy a property tax at a rate in excess of the charter limitation. In Gualco v. City of Bakersfield (1927), 86 Cal.App. 167, 171, 260 P. 308, it was determined that the city charter had not directly provided for street improvement by assessment proceedings, but instead had adopted the procedural provisions of general state law with respect thereto, and that therefore the period specified by state law for publishing notice for bids should be observed.

Thatcher v. Chicago & N. W. Ry. Co. (1887), 120 Ill. 560, 11 N.E. 853; Dutton v. Aurora (1885), 114 Ill. 138, 28 N.E. 461; and Werner v. Galveston (1888), 72 Tex. 22, 29, 7 S.W. 726, 728, 12 S.W. 159, also relied upon by the city, relate to the construction of state statutes which governed the cities involved, and are of little assistance here. Quincy v. Jackson (1885), 113 U.S. 332, 335, 5 S.Ct. 544, 28 L.Ed. 1001; Columbus Water-Works Co. v. Columbus (1892), 48 Kan. 99, 28 P. 1097, 1104, 15 L.R.A. 354; and Dawson County v. Clark (1899), 58 Neb. 756, 764, 79 N.W. 822, construed statutes or charter provisions expressly limiting the tax rate for "general purposes" or "general expenses," but (in the Dawson case) permitting "other taxes" authorized by law. In City of Austin v. Nalle (1893), 85 Tex. 520, 22 S.W. 668, 673, 960, the charter limited the tax to 1% which was to be used "for the current expenses and general improvement of the city", and it was held that the 1% was not intended to cover the interest and sinking fund of a bonded indebtedness for construction and operation of a city water and light system, also expressly authorized by the charter. In Lamar Water & Electric Light Co. v. Lamar (1895), 128 Mo. 188, 26 S.W. 1025, 31 S.W. 756, 32 L.R.A. 157, the constitutional tax limitation at issue was held not to include a tax which a subsequent section of the same constitution expressly directed to be levied to meet interest payments and create a sinking fund for city indebtedness, before such indebtedness could be incurred. The levy upheld in Pleasant Grove City v. Holman (1921), 59 Utah 242, 202 P. 1096, 1098, was a special assessment for the benefit of land from the use of water, and not a property tax as that term is used here and is commonly understood. In Butz v. City of Muscatine (1869), 8 Wall 575, 580, 75 U.S. 575, 580, 19 L.Ed. 490, the tax levy involved (to pay a judgment against an Iowa city) was held to be mandatory under a state statute which controlled over the city's charter tax limitation; however, it may be noted that the Iowa Supreme Court reached a contrary conclusion as to the same state statute (Clark, Dodge & Co. v. The City of Davenport (1863), 14 Iowa 494) and the Supreme Court of the United States, in Supervisors v. United States (1873), 18 Wall 71, 80–83, 85 U.S. 71, 80–83, 21 L.Ed. 771, declared itself bound by the state court decision, and followed it.

In contrast to the statutes and charter provisions and the control by state legislatures over many of the municipalities involved in the afore-mentioned decisions, the City of Grass Valley, a municipal corporation independent of general state legislation, whose charter is its organic law or local constitution (see Brougher v. Board of Public Works (1928), 205 Cal. 426, 438, 271 P. 487; Dalton v. Lelande (1913), 22 Cal. App. 481, 135 P. 54; Adams v. Wolff (1948), supra, 84 Cal.App.2d 435, 440–441, 190 P.2d 665, has by section 4 of Article I of its charter expressly and without exception limited the property tax rate to be levied upon property within the city to "seventy-five (75) cents on every one hundred dollars, assessed valuation of such property." Such limited rate is not stated to be for "general expenses" or "general purposes" only, but is a clearly declared maximum property tax rate, which is not subject to general state law except as the charter may provide.[3] And it seems unequivocally clear that by providing, in subsection (j), section 2, Article I, of the charter, that "in the *procedure for the creation and issuance* of * * * bonded indebtedness the general laws of the State * * * shall be observed and followed" the city adopted at most only the rather detailed provisions as to procedure embodied in the Act of 1901 (see, e. g., sections 2, 3, 5) to be followed in "the creation and issuance for such * * * indebtedness" and did not adopt section 7 of the act concerning the method of providing funds to pay the indebtedness *after* its creation and issuance, nor, more to the point at issue here, did the city authorize a tax levy for that purpose over and above the maximum rate expressly limited by its charter.

In support of my view that the tax limitation expressly declared in the charter must be observed, are San Christina etc. Co. v. San Francisco (1914), 167 Cal. 762, 141 P. 384, 385, 52 L.R.A.,N.S., 676; Burr v. San Francisco (1921), 186 Cal. 508, 199 P. 1034, 17 A.L.R. 581; and Spreckels v. San Francisco (1926), 76 Cal.App. 267, 276, 244 P. 919, which treated of the "great necessity or emergency" which, under certain terms of the charter of the City and County of San Francisco, would warrant the supervisors in temporarily suspending the otherwise controlling "dollar limit" of taxation specified in the charter. In the San Christina case the court declared (page 774 of 167 Cal., page 388 of 141 P.) that "no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials. As was said by this court in Connelly v. City and County of San Francisco [1912], 164 Cal. 101, 127 P. 834: 'An inconvenience to the city does not justify the despoiling of its taxpayers.' If these large revenues sought to be raised by the city do not fairly come within the

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3. See Rothschild v. Bantel (1907), 152 Cal. 5, 91 P. 803, to the effect that charter provisions control manner and place of safekeeping municipal funds, rather than a state statute adopted by the Legislature under the provisions of section 16½ of Article XI of the California Constitution.

purview of the emergency tax measure, it is for the city to meet the desired end either by the issuance of bonds or by an amendment of its charter. It is not for the courts themselves to amend this charter by striking therefrom any of its salutary and protective provisions." (See also Corbett v. City of Portland (1897), 31 Or. 407, 48 P. 428, 430.) In the Burr case it was held that an increase in city expenses, also urged by the city of Grass Valley in the instant case as a reason for ignoring the charter tax limitation, was not such an emergency as to authorize levy of a tax beyond the dollar limit. In so holding the court declared (pages 515–516 of 186 Cal., page 1037 of 199 P.) that a contrary holding would "practically destroy" the dollar limit, and that "If the growth of the city, or changes in the charter, or in the state law, or the entering upon new activities by the city government, or other changes which are always to be expected in a growing community, require the creation of new offices, bureaus, or commissions and the hiring of more employees, and result in large additions to the regular yearly running expenses of the city and there is no corresponding increase in the tax valuation, and these things are sufficient to create the 'great necessity' in mind when the charter was adopted in 1899, then of course, they will continue to operate every year and the dollar limit ceases to exist. It reduces the meaning of the charter provisions on the subject to a mere statement that such tax shall not exceed the dollar rate, except in cases where that rate will not raise the expenses of the city, in which event the rate will be unlimited. The charter may as well have provided that such taxes should not exceed the dollar limit, unless a higher rate was necessary to raise the money required to pay the regular annual expenses of the city. The *temporary* suspension authorized to 'enable the supervisors to provide for such necessity or emergency' would immediately become regular and permanent. The restriction to the dollar limit, which was intended to compel reasonable economy, would have no effect of that kind whatever. All that the supervisors need do to circumvent the provision would be to create a necessity by their own extravagence or by engaging in new municipal activities and enterprises, benevolent or otherwise, and the power to levy the increased rate would automatically follow.

"We think the charter makers did not intend that the dollar limit should be so ineffectual and useless."

In the Spreckels case (1926), supra, 76 Cal.App. 267, 276, 244 P. 919, 923, the continuance of sanitary measures to prevent recurrence of bubonic plague in San Francisco was held not such an emergency as would authorize suspension of the dollar limit and the court reiterated that "no argument of hardship or inconvenience will justify a court in ignoring * * * [the charter's] protective provisions."

Courts of other jurisdictions have also expressed views in conformity with those I here declare. In Weber v. Traubel, et al. (1880), 95 Ill. 427, 431, it was held that a charter provision expressly limiting the annual tax to "one percentum per annum," controlled over another charter provision which "enjoins the duty of providing, by taxation, to meet certain registered indebtedness, limiting the taxation in that regard to three mills on the dollar," and that the aggregate tax for "all purposes," including such three mills, could be only one per cent. In Gould v. City of Paris (1887), 68 Tex. 511, 4 S.W. 650, it was held that under a provision of the state constitution limiting the city to an annual tax of one-fourth of one per cent "to defray the current expenses of * * * local government," the city could not levy an additional tax of one-tenth of one per cent to provide for the interest and sinking-fund on bonds issued for the purchase of fire-fighting equipment. In so holding the court declared (page 652 of 4 S.W.), "It is a principle of law, sustained by the highest authority, that when a municipal corporation contracts a debt to be paid by taxation, if it has not the power to levy the tax, the debt cannot be enforced against it. 'The right to contract must be limited by the right to tax; and if, in the given case, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. * * * The validity of a contract which can only be enforced by a resort to taxation depends on the power to levy the tax for that purpose.' [Citation.]" (See also Corbett v. City of Portland (1897), supra, 31 Or. 407, 48 P. 428; State ex rel. Bours v. L'Engle (1898), 40 Fla. 392, 24 So. 539; Brown v. Town of Patrick (1943), 202 S.C. 236, 24 S.E.2d 365).

Petitioner city also seeks to find support in the rule of contemporaneous and practical construction of the charter provisions and points to the fact that a "special tax separate and distinct from and in excess of the general City tax" was levied in the years 1924 through 1948 to meet the street improvement bonds authorized by the election of 1923. As repeatedly emphasized by the courts of this state, however, contemporaneous and practical construction of a statute can "only be resorted to in order to clear up uncertainties and ambiguities. [Citations.] The construction of a statute by [those administering it] * * * cannot change its clear language or alter its plain meaning. [Citations.] The provisions of the charter in question not being uncertain, there is no opportunity for practical construction here." (Montgomery v. Board of Administration, etc. (1929), 34 Cal.App.2d 514, 521–522, 93 P.2d 1046, 1050, 94 P.2d 610; see also Johnston v. Board of Supervisors (1947), 31 Cal.2d 66, 75, 187 P.2d 686; California Drive-in Restaurant Ass'n v. Clark (1943), 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028.) An "erroneous administrative construction does not become decisive no matter how long continued." (Trabue Pittman Corp. v. County of Los Angeles (1946), 29 Cal.2d 385, 399, 175 P.2d 512, 521.)

It is apparent that, as urged by respondent auditor, section 4 of Article I of the charter of the city declares in plain and unequivocal language the intent to limit the city's property tax rate for all purposes to seventy-five cents, and that it is not the function of the courts to declare exceptions which are neither expressly nor even impliedly permitted by the charter. As already noted, if the people wish to increase the limit or provide exceptions, they may do so by expressly amending their charter by their own vote; there is nothing so iniquitous in the charter provision limiting the tax rate on property as to justify this court in effecting such amendment by what is known as "judicial legislation." (See Montgomery v. Board of Administration, etc. (1939), supra.) It may also be added that it is a matter of public knowledge that municipalities may secure their revenues from sources other than property taxes and may, for instance, levy sales taxes and license taxes, among others, for such purpose (see West Coast Advertising Co. v. San Francisco (1939), supra, 14 Cal.2d 516, 524, 95 P.2d 138), especially where, as here, such taxes are expressly authorized in the city charter (Art. I, § 2, sub. (i)).

For the reasons above stated, the writ sought should be denied.

EDMONDS, Justice (dissenting).

I read the provisions of the city charter with the same meaning as that stated by Justice SCHAUER. I would also deny the city any relief in this proceeding for the additional reason that, by the judgment in an action to which only the city and its auditor are parties, the property owners of Grass Valley have a tax burden placed upon them. In my opinion, litigation in that form is against the public interest and should not be entertained by this court. See my dissenting opinions in City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956, and cases cited.

95 Cal.App.2d 314

ELLIOTT v. WOOD.

Civ. 17091.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1949.

Action by William H. Elliott against Mattie Clara Wood to establish that both plaintiff and defendant owned an undivided half interest in a parcel of improved realty and in the rents, issues and profits therefrom and that they held title as tenants in common, and for an accounting and partition.

The Superior Court, Los Angeles County, Otto J. Emmo, J., entered judgment for the plaintiff and the defendant appealed.

The District Court of Appeal, Vallee, J., held that the evidence was insufficient to establish either a resulting or constructive trust and that alleged oral agreement that defendant should purchase property for herself and plaintiff, was unenforceable under statute of frauds in absence of actual or constructive fraud and reversed the judgment.

1. Trusts 🔑110

In action to establish that plaintiff owned half interest in certain improved realty purchased by defendant and in certain furniture and furnishings and in the rents, issues and profits, evidence sustained finding that the parties orally agreed to purchase the realty and that each would receive a half interest therein.

2. Trusts 🔑96

A mere violation of an unenforceable contract does not raise a constructive trust as to realty and that a party promises to buy land for another and thereafter purchases it for himself with his own money does not establish a basis for a constructive trust.

3. Trusts 🔑17(4)

Where parties entered into oral agreement whereby defendant agreed to purchase certain improved realty and take title in her name and each party was to contribute half of the funds, but defendant purchased property for herself with her own funds, agreement was unenforceable under statute of frauds, in absence of actual or constructive fraud. Civ.Code, § 1624, subd. 4.

4. Fraud 🔑12

The mere failure to perform an oral promise to convey realty is not in itself fraud.

5. Trusts 🔑72

A resulting trust arises where title to property is vested in the trustee while consideration or a part thereof is paid by the beneficiary.

6. Trusts 🔑86

To charge a resulting trust on any specific property it must be shown that trust funds went into the purchase of the property and where two persons allegedly contribute money to the purchase of realty, the title to which is taken in the name of one of them pursuant to an oral agreement, the resulting trust comes not from agreement, but from facts shown as to the amount of purchase price advanced by each and party claiming benefit of the trust must show money was paid before or at the time of the execution of the conveyance and as part of the original transaction of purchase.

7. Trusts 🔑80

Contribution of funds to enable a purchaser to complete installment payments on the purchase price of, or to make improvements on realty, until title has been acquired by another does not raise a resulting trust.

8. Trusts 🔑89(1)

In action by plaintiff to establish half interest in certain realty purchased by defendant out of her own funds, evidence was insufficient to show a valid resulting trust even if parties had in fact made an oral agreement that defendant was to purchase property and each party was to receive an undivided half interest therein.

9. Trusts 🔑72

Where parties orally agreed to purchase certain realty and that each would receive a half interest therein as tenants in common, but defendant took title in his name and plaintiff did not advance any part of the purchase price, a resulting trust did not arise.

10. Trusts ⟹78

Where parties entered into oral agreement to purchase certain realty as tenants in common and parties agreed that plaintiff was to contribute his services and serve as a carpenter in remodeling the premises and in consideration therefor defendant would furnish premises with certain household furniture and furnishings in her possession, but plaintiff made no showing that he had a right of ownership in the furniture and furnishings supplied by the defendant, a resulting trust did not arise.

◆

Walter L. Gordon, Jr., Los Angeles, for appellant.

Joseph Shane, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment decreeing that plaintiff and defendant each own an undivided half interest in a parcel of improved real property and in certain furniture and furnishings therein and in the rents, issues and profits therefrom, that they hold title as tenants in common, that the record title of the real property is in the defendant alone, that she holds title to the real and personal property as trustee for the equal benefit of plaintiff and herself, and decreeing an accounting and partition. Defendant appealed from the judgment and from an order denying her motion for a new trial.

The court found these facts. About the first part of June, 1946, plaintiff and defendant orally agreed to purchase the real property and that each would receive a half interest therein. On June 18, 1946, plaintiff and defendant purchased the property as tenants in common for $8,500 making a down payment of $1,250, escrow charges of $67.88, and a first payment of $90 on a trust deed given to secure the balance due. Each party paid and contributed half of these sums. Defendant caused title to be taken in her name and thereafter refused to cause the record title to be changed to show the half interest of plaintiff. As to the furniture and furnishings the court found that it was agreed between the parties (the date of the agreement is not stated) that plaintiff would do certain remodeling of the premises and that in consideration therefor defendant would furnish the premises with certain household furniture in her possession, and that plaintiff performed the remodeling work. The value of the work was not found. The court concluded that defendant held title to the real property as trustee for the equal and mutual benefit and enjoyment of plaintiff and defendant, and that the furniture and furnishings (without describing them) acquired by defendant after June 26, 1946, is the property of both plaintiff and defendant, each having an equal interest therein, and that possession thereof is in defendant as trustee for the equal and mutual benefit and enjoyment of plaintiff and defendant.

Appellant claims that the evidence is insufficient to support the findings that plaintiff and defendant purchased the real property as tenants in common and that plaintiff paid and contributed half of the sums mentioned, and says that the conclusion that defendant holds title as trustee for the equal benefit and enjoyment of plaintiff and defendant is without support in the record. The point is good.

[1] The evidence supports the finding that the parties orally agreed to purchase the property and that each would receive a half interest therein. Appellant does not contend otherwise. The agreement was made just prior to or on April 26, 1946. The evidence bearing on the question whether a trust was created, stated in the light most favorable to respondent, is as follows: On April 26, appellant Wood with her own funds made a deposit of $500 on the purchase price and opened an escrow. The escrow instructions called for a down payment of $2,500. Respondent Elliott did not pay any money and before close of escrow Mrs. Wood persuaded the seller to reduce the down payment to $1,250. On May 22, 1946, Mrs. Wood, using her own funds, paid $750, the balance of the down payment to the escrow holder. Before the close of escrow she paid the escrow charges of $67.88 with her own funds. On June 18, 1946, a grant deed of the property from

the sellers to Mrs. Wood alone was recorded and thereafter mailed to her. Mrs. Wood with her own furniture and furnishings moved into the property on June 25, 1946. She thereafter purchased additional furniture and furnishings.

On June 26, 1946, Elliott gave Mrs. Wood a check for $614, and a check payable to the sellers for $90, being the first installment due on a note representing the balance of the purchase price over and above the down payment of $1,250. The $90 check was never cashed. Elliott had not, prior to June 26, 1946, paid or contributed any money for or toward the purchase of the real property. Thereafter, Elliott made various improvements to the building on the property by way of carpenter work in remodeling, and paid Mrs. Wood $20 with which to buy some bedspreads. On September 30, 1946, Mrs. Wood returned the $614 to Elliott in United States money orders. From the time she moved into the premises Mrs. Wood operated it as a rooming house.

It is impossible to ascertain from the record whether the court below predicated its conclusion that appellant holds a half interest in the real property in trust for respondent upon the theory that a constructive trust was created or upon the theory that a resulting trust was created. The judgment cannot be sustained upon either theory.

[2-4] Respondent says that he does not claim a resulting trust. He says the vital inquiry is whether there was evidence of the creation of a legal obligation on the part of appellant to convey the half interest to him. He does not point us to any such evidence. We have examined the transcript and found none. The oral agreement was invalid and unenforceable as to the real property. Civil Code, sec. 1624, subd. 4. A mere violation of an unenforceable contract does not raise a constructive trust as to real property. Where a party orally promises to buy land for another and thereafter buys it for himself with his own money there is no basis for a constructive trust. Mazzera v. Wolf, 30 Cal.2d 531, 537, 183 P.2d 649; Bradley v. Duty, 73 Cal.App.2d 522, 526, 166 P.2d. 914; Bauman v. Wuest, 32 Cal.App. 217, 162 P. 434; cf. Neet v. Holmes, 25 Cal.2d 447, 464, 154 P.2d 854. The agreement is unenforceable under the statute of frauds in the absence of actual or constructive fraud. The mere failure to perform an oral promise to convey real property is not itself fraud. Mazzera v. Wolf, 30 Cal.2d 531, 535, 537, 183 P.2d 649. There is neither proof of actual nor constructive fraud in the case at bar.

[5-7] We discuss the question whether a resulting trust was created for the reason that respondent apparently attempted to allege such a trust. A resulting trust arises where title to property is vested in the trustee while the consideration or a part thereof is paid by the beneficiary. Bradley v. Duty, 73 Cal.App.2d 522, 526, 166 P.2d 914. In McQuin v. Rice, 88 Cal.App.2d 914, at pages 917, 918, 199 P.2d 742, 744, we stated the principles applicable to the creation of a resulting trust as follows: "To charge a resulting trust upon any specific property it must be shown that trust funds went into the purchase of the property (Taylor v. Morris, 163 Cal. 717, 724 [127 P. 66]), and where two persons allegedly contribute money to the purchase of land, the title to which is taken in the name of one of them pursuant to an oral agreement, the resulting trust comes, not from the agreement, but from the facts shown as to the amount of purchase price advanced by each. Pavlovich v. Pavlovich, 22 Cal.App. 500, 506 [135 P. 303]. The party claiming the benefit of the trust must show that the money was paid before or at the time of the execution of the conveyance and as part of the original transaction of purchase. Hellman v. Messmer, 75 Cal. 166, 169-170 [16 P. 766]; Lincoln v. Chamberlain, 61 Cal.App. 399, 401 [214 P. 1013]; Bradley v. Duty, 73 Cal.App.2d 522, 526 [166 P.2d 914]; cf. Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal.App.2d 188, 191-192 [44 P.2d 439]. * * * Contributions of funds to enable a purchaser to complete installment payments on the purchase price of, or to make improvements on, real property after title has been acquired by another do not raise a resulting trust. Hellman v. Messmer, 75 Cal. 166, 170 [16 P. 766]; Neusted

v. Skernswell, 69 Cal.App.2d 361, 368 [159 P.2d 49]; Dimity v. Dixon, 74 Cal.App. 714, 722 [241 P. 905]; Lincoln v. Chamberlain, 61 Cal.App. 399, 401 [214 P. 1013]; 2 Rest., Trusts, 454, com. o, pp. 1385-1386."

[8, 9] There was a complete failure of proof on the part of the plaintiff to show a valid resulting trust. No funds of plaintiff went into the purchase of the real property. The fact that either before or at the time of the execution of the conveyance, or as a part of the original transaction of purchase, the parties made an oral agreement as found by the court to purchase the property and to each receive an undivided half interest therein does not help the plaintiff. As we have said, a resulting trust comes not from the agreement but from the facts shown as to the amount of purchase price advanced by respondent. He did not advance any part of the purchase price. Hence a resulting trust did not arise. The fact that respondent made improvements on the property after its purchase does not raise a resulting trust.

[10] The findings with respect to the furniture and furnishings are not sufficient to support the conclusion that the furniture and furnishings acquired by appellant after June 26, 1946, are the property of both respondent and appellant, each having a half interest therein, and that appellant has possession as trustee. As we have said, the court found that it was agreed between the parties that respondent would do certain remodeling of the premises and that in consideration therefor appellant would furnish the premises with certain household furniture and furnishings in her possession and that respondent performed the remodeling work. The only evidence upon which these findings could have been based is that of respondent wherein he testified: "Then it was discussed then that she had the furnishing and I had the knowledge of a carpenter, trained carpenter, and I would balance my—the improvement against the furniture, but after she gets her living expenses out —

"Q. Just so that we can get this thing straight, see if I understand you: In that conversation that took place she said she had the furnishing of the house? A. Yes.

"Q. You told her you had the skill of a carpenter and the knowledge of a carpenter? A. Yes.

"Q. And you were going to make the improvements in the place? A. Yes, that's right.

"Q. And do the carpenter work? A. Yes.

"Q. And offset that against the furniture that she was going to put in the place? A. Yes.

"Q. Have I correctly stated it, Mr. Elliott? A. Yes.

"Q. Also, she was going to live in the house? A. Yes."

This discussion and the findings based thereon was insufficient to create a trust. There is nothing in the discussion or in the findings from which it may be inferred that appellant intended to pass any title, legal or equitable, as to a half interest in the furniture and furnishings, to respondent. Clearly, she did not transfer any interest. The discussion was extremely indefinite and uncertain. The most that can be said of it is that appellant was to contribute the furnishings and respondent was to contribute his services and that after she received her living expenses the parties would divide the income. In the absence of evidence showing that respondent has a right of ownership in the furniture and furnishings, an action to establish a trust in the property cannot be maintained. 25 Cal.Jur. 139, sec. 16. If the evidence be interpreted to mean that appellant agreed to transfer an interest in the furniture and furnishings to respondent in consideration of the performance of services by him, it was merely a contract for the sale of personal property which did not transfer any enforceable right to ownership in the property and such contract does not furnish the basis for a suit to enforce a trust. Ibid.

Appeal from order denying motion for a new trial dismissed. Judgment reversed.

SHINN, P. J., and WOOD, J., concur.

95 Cal.App.2d 332

BERTOLOZZI v. PROGRESSIVE CONCRETE CO. et al.

Civ. 14076.

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1949.

Agnes Bertolozzi brought action against the Progressive Concrete Company (a copartnership), and others to recover for injuries sustained at night when she walked into a framework of boards placed by defendants around an area of freshly poured concrete on a portion of sidewalk, on ground that defendants had failed to comply with ordinance requiring such a barrier to have reflectors.

The Superior Court in and for the City and County of San Francisco, William F. Traverso, J., rendered a judgment for the plaintiff, and defendants appealed.

The District Court of Appeal, Dooling, J., affirmed the judgment, and held that introduction of ordinance was not error, that certain evidence was properly excluded, that certain instruction was not erroneous, that refusal to give defendants' requested instructions was not error, and that Superior Court did not coerce jury.

1. Municipal corporations 🔑818(10)

In action by pedestrian to recover for injuries sustained when pedestrian walked at night into a framework of boards placed around an area of freshly poured concrete on portion of sidewalk, admission of ordinance requiring a substantial barrier with reflectors to be erected by anyone who has made any portion of any public street dangerous was not error, though ordinance was a wartime measure to meet blackout regulations, and hostilities had ended at time of accident, where mayor had not formally declared that emergency had ceased to exist.

2. Municipal corporations 🔑120

In action by pedestrian for injuries, court properly refused to admit testimony of city attorney that it was not intended that ordinance requiring everyone who has made a portion of any public "street" dangerous to erect a substantial barrier around it with reflectors should apply to sidewalks, since the word "streets", unless expressly qualified includes sidewalks.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Streets".

3. Municipal corporations 🔑120
Statutes 🔑190

Where a statute or ordinance is clear on its face, there is no room for extrinsic evidence of its meaning.

4. Trial 🔑194(16)

Instruction in injury action that everyone who makes any portion of a public street dangerous must erect a substantial barrier with reflectors, and that violation of wartime blackout ordinance constituted negligence as a matter of law, was not erroneous on ground that jury was instructed that use of lighted lantern on barrier constituted negligence as a matter of law, where that proviso of ordinance dealing with blackout regulations was not read to jury, and instruction by its own terms was limited to provisions of ordinance read to jury.

5. Appeal and error 🔑216(2)

Where a general instruction that is correct as far as it goes, and which is deficient merely by reason of its generality, is given, the injured party may complain on appeal only in case he requests that charge be made more specific, or asks for other qualifying instructions and his request is denied.

6. Appeal and error 🔑930(2)

District Court of Appeal was required to assume that jury followed instructions.

7. Trial 🔑253(4)

In action by pedestrian for injuries sustained when pedestrian walked at night into barricade, requested instruction that, if jury found that proximate cause of accident was absence of lantern at barricade, and that defendants had placed a lantern there, but that it had been removed by a third person, defendants were not negligent, was properly refused as incomplete and misleading for failure to require defendants to use ordinary care in preventing removal of lanterns by third persons, and to require that lantern be placed where visible to pedestrian in exercise of ordinary care.

8. Trial ⚷261

Courts are not obliged to reframe erroneous or incomplete instructions, and parties cannot complain that an instruction of such character has not been given.

9. Trial ⚷314(1)

Trial court has a wide discretion in determining length of time that a jury may deliberate before court discharges jury.

10. Appeal and error ⚷217

Where counsel for defendants voiced no objection to fact that jury was not sooner discharged and were content to gamble on a verdict in favor of defendants, they could not complain on appeal that jury was required to continue its deliberations after some of its members had told the court that they did not believe that an agreement could be reached.

Philander Brooks Beadle, Ernest E. Emmons, Jr., San Francisco, for plaintiff and respondent.

Cooley, Crowley & Gaither, San Francisco, for defendants and appellants.

DOOLING, Justice.

On July 26, 1946 in the City and County of San Francisco plaintiff sustained personal injuries by walking into a framework of boards placed by defendants around an area of freshly poured concrete on a portion of the sidewalk on Union Street between Mason and Powell Streets. For the injuries then received plaintiff after a jury trial secured judgment against defendants. The mishap occurred in the night time and the evidence is in conflict as to whether at the time there was a lighted lantern at that end of the barrier to warn pedestrians of its presence.

Over objection plaintiff introduced an emergency ordinance of the City and County of San Francisco. This ordinance in substance requires every person, firm or corporation, who has made any portion of any "public street, park or way" dangerous, to erect a substantial barrier around such dangerous portion and cause to be maintained at both ends of the barrier during the night time a lighted lantern. The ordinance contains a proviso that during the emergency proclaimed by the Mayor on December 7, 1941 "and until said emergency ceases to exist as proclaimed by the Mayor, no lighted lantern or other light shall be left or maintained at said barrier but the said barrier shall be marked * * * by a reflector or reflectors or other device or devices which shall properly warn persons of said dangerous condition. The type, character and number of said reflectors or devices shall be designated and approved by the Director of Public Works."

The proviso was admittedly a wartime measure to meet the blackout regulations and the recital of emergency in the ordinance plainly so states. Admittedly hostilities were ended at the time of plaintiff's injuries but the Mayor had not formally declared that the emergency proclaimed on December 7, 1941 had ceased to exist.

[1] Under these circumstances we cannot see how it can be held to have been error to permit the introduction of the ordinance. By its express terms the proviso continued in force until the Mayor's proclamation of the cessation of the emergency and required a reflector or other warning device on the barrier. Admittedly defendants had placed no such device on the barrier here involved.

In the absence of any evidence that any warning device was placed on the barrier it is unimportant that no evidence was introduced as to the type, character and number of such devices which had been designated and approved by the Director of Public Works as provided in the ordinance. Whatever the action of the director may have been defendants clearly had not complied with it.

[2, 3] Defendants offered to prove by the City Attorney who drafted the ordinance that it was not intended to apply to sidewalks. The court properly refused to admit this evidence. Under an unbroken line of authority in California the word "streets", unless expressly qualified, includes sidewalks. Bonnet v. City and County of San Francisco, 65 Cal. 230, 3 P. 815; Marini v. Graham, 67 Cal. 130, 7 P. 442; Ex

parte Taylor, 87 Cal. 91, 94, 25 P. 258; Martinovich v. Wooley, 128 Cal. 141, 143, 60 P. 760; Heath v. Manson, 147 Cal. 694, 699, 82 P. 331; Taylor v. Manson, 9 Cal.App. 382, 391, 99 P. 410; cf. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 680, 102 P.2d 422, 104 P.2d 26, construing the Vehicle Code. Where a statute or ordinance is clear on its face there is no room for extrinsic evidence of its meaning. Johnston v. Board of Supervisors, 31 Cal.2d 66, 75, 187 P.2d 686; cf. 23 Cal.Jur., Statutes, sec. 149, p. 774.

The jury, at the request of plaintiff, was given the following instruction:

"The applicable portions of the Public Works Code of the City and County of San Francisco, in effect at the time of this accident, provides as follows:

"'Every person, firm or corporation * * * under whose immediate direction or authority, either as principal, contractor or employer, any portion of any public street * * * or way may be made dangerous, must erect and, so long as the danger may continue, maintain around the portion of such street * * * or way so made dangerous a substantial barrier, * * * but the said barrier shall be marked, designated or delineated by a reflector or reflectors or other device or devices which shall properly warn persons of said dangerous condition * * *.'

"A sidewalk is that portion of a street, other than the roadway, set aside for pedestrian travel.

"A violation, if any, of the provisions of the Public Works Code just read to you constitutes negligence as a matter of law provided such negligence was not excusable or justifiable and is a proximate cause of plaintiff's injury."

[4] This instruction is criticized. Since the proviso of the ordinance expressly prohibited the use of lighted lanterns to mark the barrier defendants claim that the jury was instructed that the use of a lighted lantern for that purpose "constitutes negligence as a matter of law." In the first place that portion of the ordinance prohibiting the use of lighted lanterns was not read to the jury and the instruction by its own terms was limited to "the provisions of the Public Works Code *just read to you.*" Secondly the jury was instructed that the violation of the ordinance to constitute negligence must be "a proximate cause of plaintiff's injury." The presence of a lighted lantern could not conceivably proximately cause the plaintiff's injury and we must concede the ordinary measure of common sense to the members of the jury.

[5] Defendants also claim that the instruction in effect advised the jury that even if the barrier was adequately marked by a lighted lantern a violation of the provision for reflectors or other devices would constitute actionable negligence. Not so. If the barrier was adequately marked by a lighted lantern the absence of reflectors or other devices could not be the proximate cause of plaintiff's injury. The instruction was correct as a matter of law. If it is subject to the criticism that it might have been more elaborate, e. g. that it might more clearly have spelled out that with a lighted lantern at the end of the barrier plainly visible to any pedestrian using ordinary care the absence of reflectors could not be a proximate cause of plaintiff's injury, the ready answer is that defendants asked for no such instruction. "(I)t is unquestionably the law that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain upon appeal only in case he requests that the charge be made more specific, or asks for other qualifying instructions, and his request is denied." 24 Cal.Jur., Trial, sec. 74, p. 796; Ohran v. County of Yolo, 40 Cal.App.2d 298, 307, 104 P.2d 700; Crooks v. White, 107 Cal.App. 304, 311–312, 290 P. 497.

After the jury had deliberated for a period it returned into court and the following colloquy occurred between the foreman and the judge:

"The Foreman: * * * It is up to us then, your honor, to judge whether one lamp would be sufficient reflectors for that particular situation, not being in conflict with any code?

"The Court: You are the exclusive judges * * * of the facts and the credibility of the witnesses. It is your province and responsibility to determine the value, effect and weight of the evidence.

"The Foreman: As to what is adequate or inadequate, it is up to us?

"The Court: Yes. * * *"

[6] This interchange makes it clear that the jury understood that the presence of a lighted lantern adequate to give warning of the presence of the barrier would absolve defendants of liability and were concerned to know their powers in judging of its adequacy as a warning. They had been instructed on negligence, ordinary care and proximate cause and we must assume that in determining the adequacy of the warning, if any, they followed these instructions.

[7] There was some evidence that on previous occasions lighted lanterns left at barriers on the streets by defendants had been removed by children or others. Defendants proposed two instructions on this subject which the court refused to give. The more complete of the two reads as follows: "If you find that the proximate cause of the accident and the resulting injuries to the plaintiff, if any there were, was the absence of a lantern at or near the barricade, and if you further find that the defendants had placed a lantern at the barricade prior to the time of the accident but that said lantern had been removed by an unknown third person, then, if you find these facts to be true, I instruct you that the defendants were not guilty of negligence and that your verdict must be in their favor."

[8] The instructions as proposed were incomplete and misleading. The question whether defendants, knowing of the fact that lanterns had previously been removed from other barriers, should in the exercise of ordinary care have taken some precautions to prevent this being done in the case of this barrier, would seem properly to be a jury question. The mere placing of a lantern, lighted or unlighted, "at or near the barricade" would not excuse defendants, even if it remained there, unless it was lighted and placed at the end of the barricade from which the injured person approached so as to be visible to her in the exercise of ordinary care. Courts are not obliged to reframe erroneous or incomplete instructions and parties cannot complain that an instruction of that character has not been given. Wiley v. Young, 178 Cal. 681, 683, 174 P. 316; Hart v. Farris, 218 Cal. 69, 75, 21 P.2d 432; Paine v. Bank of Ceres, 59 Cal.App.2d 242, 247–248, 138 P.2d 396; Johnson v. Southern Pac. Co., 105 Cal.App. 340, 356–357, 288 P. 81.

[9, 10] The record does not support the claim that the court coerced the jury. "The trial court has a wide discretion in determining the length of time that a jury may deliberate before discharging them." Hughes v. Schwartz, 51 Cal.App.2d 362, 371, 124 P.2d 886, 890. No impropriety of the judge such as appeared in Mahoney v. San Francisco, & S. M. Ry. Co., 110 Cal. 471, 42 P. 968, 43 P. 518, cited by appellants, is found in this record; and counsel for appellants voiced no objection to the jury not being sooner discharged. Having been content to gamble on a verdict in their favor they are not in a position to complain now that the jury was required to continue its deliberations after some of its members had told the court that they did not believe an agreement could be reached.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 352

In re LUNDELL'S ESTATE.

LUNDELL et al. v. BENNETT.

Civ. 17121.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1949.

Rehearing Denied Jan. 26, 1950.

See 214 P.2d 23.

Sadie McCormac Lundell and another, as executors of the estate of Wendell Phillip Lundell, deceased, petitioned for allowance of extraordinary fees to petitioners and their attorney, contested by Alberta Grace Bennett, as guardian of Allen Vincent Lundell, a minor.

From an order of the Superior Court of Los Angeles County, Harold B. Jeffery, J., awarding the attorney an extraordinary fee for services rendered in settlement of certain life insurance claims, contestant appealed.

The District Court of Appeal, Per Curiam, reversed the order, holding that the fee allowed was so great as to shock the conscience, in the absence of a sufficiently definite showing of the extraordinary nature of the attorney's services.

1. Executors and administrators ⚷216(2)

Probate courts are charged with duty to protect rights of persons interested in decedents' estates by preventing improper dissipation of assets thereof, especially where one of such persons is a minor, and depletion of estate by allowance to executors' attorney of extraordinary fee, not clearly shown to have been earned, cannot be tolerated.

2. Executors and administrators ⚷216(2), 256(6)

The probate court has large discretion in allowance of fees to executors' attorneys, and its judgment determining amount of such fees will not be interfered with on appeal, except in case of plain abuse of discretion.

3. Executors and administrators ⚷216(2)

An extraordinary fee of $12,000, awarded by probate court to executors' attorney for services in negotiating, without litigation, settlement of disputed claims on testator's life insurance policies in total sum of $150,000 for $100,000, on attorney's statement that about 100 hours of time was spent thereon, was so great as to shock conscience and require reversal of order allowing it as abuse of discretion, in absence of more definite showing of extraordinary nature of attorney's services.

◆

Sprague & Sparks, Los Angeles, for appellants.

Prentiss Moore, Charles M. Hughes, George L. Duke, Los Angeles, for respondents.

PER CURIAM.

The appeal herein is from an order awarding the attorney for the executors extraordinary attorney fees in the sum of $12,000.00 for services rendered in connection with the settlement of life insurance claims. Appellant is the guardian of decedent's minor son who is a beneficiary under a trust set up in the will, other beneficiaries thereunder being the widow, nephews and nieces of decedent.

It appears that the decedent was the owner of three policies in the total sum of $150,000.00, the beneficiaries being three separate corporations of which decedent was the owner and *alter ego*. The policies in question were taken out about four months before decedent's death. The life insurance company disputed liability under the policies and demanded an autopsy, "stating that they had information to indicate that Wendell Lundell took his own life, which under the policies would have required the companies to have returned only the premiums which had been paid the incontestable clause being for two years." In addition to this defense the insurance company alleged fraud in the preparation of the insurance application, which, if true, would have resulted in no liability under the policies.

Negotiations for settlement of the disputed claim took place between May and October of 1948, and George L. Duke, attorney for the executors, testified that "approximately one hundred hours of time was expended on this thing", in connection with the working out of a compromise. The attorney further stated that "when these negotiations were first inaugurated, that the best offer that was made was perhaps $50,000.00." Settlement was finally effected in the total sum of $100,000.00, and the compromise approved by the court. There was no litigation instituted, and as stated by the attorney, "one of the reasons that this was an extremely difficult negotiation was because of the obvious reluctance on the part of the widow, one of the executors * * * to avoid publicity, which would necessarily have followed had litigation been instituted."

It is appellants' contention; (I) that the attorney "is not entitled to any fee for extraordinary services in connection with the settlement over and above a just compensation for the preparation of the petition for compromise and the securing of the order thereon"; (II) that "The trial court abused its discretion in its award of attorney's fees", which in appellants' opinion "should not exceed the sum of $500.00."

The appellants' argument is that "As a part of the assets of the estate, there existed these claims against the insurance company and by the settlement of these claims the value thereof was determined and the sum of $100,000.00 then became an asset in place of the claims"; that it was the duty of the attorney to assist the executors in collecting the assets, hence the attorney's services herein cannot be deemed extraordinary, except as to the matter of preparing the petition to compromise the claim and securing the order thereon. The fact that the attorney was not required to institute any litigation in order to collect the insurance is given special prominence in appellants' briefs.

"The rule is well established", concede the appellants, "that an award of an attorney's fee will not be reversed on appeal unless it is so excessive as to amount to an abuse of discretion." Appellants then aver that "The magnitude of this sum ($12,000.00) is so plainly and palpably exorbitant as to shock the conscience and require a reversal". It is the respondents' position, that in securing the $100,000.00 settlement of the $150,000.00 insurance claim, the estate was thereby enriched and that the fee allowed by the probate court, $12,000.00, or 12% of the amount recovered, was entirely reasonable and, under the rule above referred to, should not be disturbed by a reviewing court.

The petition for extraordinary fees merely states that the life insurance companies "refused to pay any portion of the insurance * * * and that your petitioners (the executors), together with their attorney, * * * after long negotiations with the said insurance company, compromised the claims * * * and have received as a result of said compromise, the sum of $100,000.00 in cash", which compromise was approved by the court. The petition sought an extraordinary fee of $500.00 for each of the executors and $15,000.00 for the attorney's alleged "extraordinary services rendered in connection with the collection of said policies of insurance". The executors' claim for extraordinary fees was denied, but the attorney was granted extraordinary fees in the sum of $12,000.00, as hereinbefore mentioned.

It will be noted that neither in the above petition, nor in the testimony given by the attorney, is there any detailed statement of exactly what "extraordinary" services were rendered. The attorney testified that "negotiations" were carried on, but it is not stated whether such negotiations were with the insurers' attorneys or whether they were merely the usual negotiations which normally take place between a claimant and a claim agent or claim department. Apparently the executors participated in these negotiations, and for all that appears in the record, may have been well able to bring about the settlement without the aid of any attorney's services, either ordinary or extraordinary. Obviously, the attorney's bare statement that "approximately one hundred hours of time was expended on this thing" is in no manner enlightening nor persuasive where an extraordinary fee of this amount is under consideration.

The non-enlightening condition of the record in so far as showing any basis for the court's order, is further made manifest by the following excerpt. After argument participated in by both attorneys and the probate court, the following occurs: "Mr. Duke. * * * I might say to Your Honor quietly * * * (at this time an off-the-record conversation ensued).

"Mr. Sprague: Of course, that did not involve any legal research or anything of that nature. (Further off-the-record conversation.)" The probate court thereupon ordered: "attorney fee $12,000.00", and the proceedings were terminated.

The above "off-the-record conversations" appear to be relied upon in respondents' brief, and after detailed argument to the effect that the award was a reasonable one, respondent says: "Coupled with all the foregoing, the fact is that the probate judge had before him considerable information in addition to that which appears in the reporter's transcript (Rep.Tr. p. 10, lines 1 and 4), and from such information was well satisfied that $12,000.00 was a reasonable fee and if the appellate court had before it the same information as was made available to the trial judge, respondents submit that there would be no hesitation in at least affirming the award."

As respondents well know, in the American tradition judicial decisions are not predicated on "off-the-record" information privately disclosed to a judge by attorneys or others. If the executors' attorney was entitled to $12,000.00 for extraordinary services, those interested in the estate are entitled to know the exact nature of those services. In the instant case, as noted in appellant's brief, the attorney will, regardless of any extraordinary fee, "receive $1,000.00 as a portion of his statutory fees resulting from the settlement of this claim", under Section 901 of the Probate Code providing that "for all above fifty thousand dollars, (compensation shall be) at the rate of one per cent." Moreover, appellants' brief concedes that the attorney is entitled to an extraordinary fee of not exceeding $500.00 for preparing the petition to compromise the claim and securing an order thereon. And, as appellants' brief continues, without some more definite showing as to the "extraordinary" nature of the attorney's services than that presented by the record herein, the $12,000.00 award is "so great as to shock the conscience at first blush".

[1] Probate courts, like other judicial tribunals, are at all times and under all circumstances the servants of the people. Such courts, in administering the valuable estates of decedents, are charged with the duty of protecting the rights of persons interested in those estates by preventing the improper dissipation of assets. This is no light responsibility. And where one of those interested in the estate is a minor and therefore a ward of the court, the importance of conserving the assets is of paramount importance. The depletion of such an estate by the allowance of extraordinary fees not clearly shown to have been earned cannot be tolerated.

[2] The rule is well established, as stated in Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200, 1202, that the probate court has a large discretion in the allowance of such fees, and that "when the court has made its determination in respect thereto, its judgment will not be interfered with on appeal, except only in the face of a plain abuse of discretion."

[3] In the present case the record indicates that on the attorney's statement that "approximately one hundred hours of time was expended on this thing", the probate court awarded an extraordinary fee of $12,000.00, which would be at the rate of $120.00 per hour. Stated another way, in addition to the regular statutory fees, the attorney is granted, for services not involving any litigation and for negotiation only, as much as a Superior Court judge receives for nine months' work. Such a fee, under the meagre record here presented, does, indeed, shock the conscience, and must be deemed an abuse of discretion.

The order appealed from is reversed.

HADGES v. IVERSON.

Civ. 16895.

District Court of Appeal, Second District,
Division 3, California.
Dec. 30, 1949.
Rehearing Denied Jan. 18, 1950.
Hearing Denied Feb. 27, 1950.

Action by Thomas Hadges and others against Paul E. Iverson for damages for alleged failure to represent plaintiffs skillfully as their attorney in a trial.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., granted defendant's motion to dismiss for want of prosecution, and plaintiffs appealed.

The District Court of Appeal, Wood, J., held that plaintiffs' failure to bring action to trial and to disclose their residence addresses to defendant to enable him to take their depositions showed want of prosecution, and affirmed the order, and denied petition for augmentation of record.

1. Army and navy 🔑34

In action against attorney by clients for damages for allegedly failing to represent them skillfully as their attorney in another action, where attorney returned from service three years after action was filed, plaintiffs, in opposition to defendant's motion to dismiss for want of prosecution, could not rely upon provisions of Soldiers' and Sailors' Civil Relief Act to excuse their actions in delaying the trial. Code Civ. Proc. §§ 581a, 583; Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U.S.C.A.Appendix, §§ 501 et seq., 521.

2. Army and navy 🔑34

The statute providing while a defendant is in military service, court must determine that ability of defendant to conduct his defense is materially affected by his military service, and that stay of proceedings is necessary, is for benefit of party in military service, and grants no privilege to his adversary. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U.S.C.A.Appendix, §§ 501 et seq., 521.

3. Dismissal and nonsuit 🔑60(1)

Plaintiff has duty at every stage of a proceeding to use diligence, and to expedite his case to final determination.

4. Dismissal and nonsuit 🔑60(2)

In action against attorney by clients for damages for allegedly failing to represent them skillfully as their attorney in another action, where attorney returned from service three years after action was filed and attempted to bring action to trial, and clients failed to disclose their resident addresses to enable attorney to obtain service to take depositions, action would be dismissed for want of prosecution. Code Civ. Proc. §§ 581a, 583; Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U.S.C.A.Appendix, §§ 501 et seq., 521.

5. Appeal and error 🔑659(3)

Appellants' petition for augmentation of record to include portions of oral proceedings had at hearing of motion to dismiss that appellants had authorized an attorney to appear for them, and to include other evidence which were not necessary and material parts of record, would be denied.

Thomas Hadges, George Hadges, Demosthenes Hadges, in pro per.

Paul E. Iverson, in pro per.

WOOD, Justice.

Appeal by plaintiffs from an order granting defendant's motion to dismiss, and from an order dismissing, the action for want of prosecution.

On December 10, 1942, plaintiffs sued the defendant, an attorney at law, for damages for allegedly failing to represent them skillfully, as their attorney, in the trial of a municipal court action wherein these plaintiffs had been sued upon an account for groceries and merchandise. Summons and complaint in this action were served on defendant on December 21, 1942, and at said time the defendant was on active duty in the United States Navy. Defendant did not appear in the action, except to file two affidavits and a notice of motion as hereinafter mentioned.

About October 18, 1945, the defendant called one of plaintiffs' attorneys by telephone, and told him that defendant was about to be placed on inactive duty in the

Navy, and requested that the action be dismissed or that he be permitted to take the depositions of plaintiffs. The attorney replied that he would contact the plaintiffs about the matter. On October 31, 1945, plaintiffs' attorneys wrote a letter to Thomas Hadges, one of the plaintiffs, in which he stated: "Mr. Iverson [defendant] is back from the service and phoned me the other day. He wants to do something about the suit against him. I am still attorney of record in that. Probably I should be substituted out. If I am not I shall have to accept service on your behalf. Please let me hear from you." That letter was addressed to the plaintiffs' post office box address,—P. O. Box 25, Station "M", Los Angeles 32, California. On November 7, 1945, the defendant, not having heard from said attorney, called him again by telephone and the attorney told the defendant that "he had been unable to contact his clients [plaintiffs]." In that conversation defendant told the attorney that if the case was not dismissed he would like to take the depositions of the plaintiffs before filing an answer. The attorney replied that if plaintiffs would not agree to a dismissal of the action the attorney could accept service of a notice to dismiss or of a notice to take depositions, but he could not supply the residence address of plaintiffs. After plaintiffs had received said letter of October 31st from their attorney, they prepared, and sent to the attorney on November 9th, a document entitled "Substitution of Attorneys," which provided that plaintiffs were substituted to act for themselves in the place of their attorneys of record. On November 10, 1945, the attorneys signed that document and returned it to plaintiffs, who then filed it in the clerk's office and notified the defendant that the substitution had been made. On November 14, 1945, defendant received a letter from one of plaintiffs' former attorneys, which letter stated in substance that he had received a "Substitution of Attorneys" from the plaintiffs, that plaintiffs would be acting for themselves, and that they gave no residence address, but the address on the substitution was "Thomas Hadges P. O. Box 25, Station 'M', Los Angeles 32, Calif." On November 15, 1945, defendant filed in this action an affidavit entitled "Affidavit in Support of Order Requiring Plaintiffs to File and Address Where They Can Be Served With Process." In that affidavit he stated that the action was filed on December 10, 1942, and that he (defendant) "desires to have this action disposed of and, if necessary, to appear in the action, to take the depositions of the plaintiffs before pleading to the complaint" ; and that defendant "is informed and believes * * * that the plaintiffs are intentionally secreting themselves to avoid service of process upon them." On said date the court made and filed an order entitled "Order That Plaintiffs File an Address Where They Can Be Served With Process." It was ordered therein: that the plaintiffs serve upon defendant and file in said court a notice of their residence addresses or other addresses where personal service of process can be made upon them; defendant shall not be required to file a pleading in said action until 20 days after the serving and filing of such notice; said order and the defendant's affidavit shall not be considered as an appearance by defendant, nor shall they prejudice the rights of defendant; and a copy of said order and affidavit be mailed to plaintiffs, addressed to "Thomas Hadges, P. O. Box 25, Station 'M', Los Angeles 32, Calif." On November 16, 1947, the defendant mailed a copy of the order and a copy of the affidavit to Thomas Hadges as directed in said order. Thomas Hadges received said copies of those documents. None of the plaintiffs served or filed his residence address or any address as required by said order.

On February 10, 1948, defendant filed a "Notice of Motion to Dismiss Action Under C.C.P. 581a and 583." Said notice stated that the motion would be made on the following grounds: (1) that plaintiffs failed to have judgment entered within three years after service of summons although no answer had been filed; (2) that plaintiffs failed to bring said action to trial within two years after it was filed; and (3) that plaintiffs failed to bring said action to trial within five years after it was filed. In support of said motion, the defendant also filed on February 10, 1948, his affidavit which stated: that he has not entered into any written stipulation with any of the plaintiffs or their attorney that the time of trial should be postponed for any time; that he never concealed himself from the plaintiffs and, although he has been absent from California from time to time since the filing of said action, he has at all times maintained a law office at 215 West Sixth Street in Los Angeles, which fact at all times herein mentioned has been well known to plaintiffs and their attorney. Said notice of motion to dismiss, and the affidavit in support of said motion, were served on the plaintiffs on February 9, 1948, by sending a copy of said motion and affidavit to each plaintiff by mail to said post office box address. On March 1, 1948, the motion to dismiss was heard and granted, and thereupon the court made an order dismissing the action under the provisions of sections 581a and 583 of the Code of Civil Procedure.

Section 581a of the Code of Civil Procedure provides in substance, insofar as material here, that an action must be dismissed by the court on its own motion, or on motion of any party, if summons has been served, and no answer has been filed, if the plaintiff fails to have judgment entered within three years after service of summons.

Said section 583 provides in substance, insofar as material here, that the court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after the action is filed to bring such action to trial, except where the defendant has been absent from the state or concealed therein. Any action shall be dismissed by the court on motion of the defendant after due notice to plaintiff, or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where the defendant has been absent from the state or concealed therein.

[1-4] Appellants contend that said sections 581a and 583 were suspended during the war and were superseded by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.; and that the time during which the defendant was in the military service should not be counted as a part of the time in which appellants were required to bring the action to trial. They argue that under the provisions of that act it would have been impracticable and futile for appellants to proceed to trial; that if appellants had attempted to try the case while defendant was in the military service the court would have been required to determine, under the provisions of section 521 of said act, that the ability of the defendant to conduct his defense was materially affected by his military service and the court would have been compelled to grant a stay of proceedings; and that if the appellants had obtained a judgment against the defendant, the defendant upon his discharge from the service could have had the judgment set aside and the proceedings reopened. Those arguments indicate that appellants were of the opinion that they could rely upon the provisions of the Soldiers' and Sailors' Civil Relief Act to excuse their actions in delaying the trial. "Section 521 is manifestly a statute for the benefit of the party who is in military service and grants no privileges to his adversary." Thornley v. Superior Court, 89 Cal. App.2d 662, 663, 201 P.2d 567, 568. It was also said in that case, 89 Cal.App.2d at page 664, 201 P.2d at page 568, that said act "was enacted for the benefit of one in the military services and that it is not available beyond its express terms to his adversary to excuse his noncompliance with the mandatory provisions of the state statute." In the present case, as above stated, appellants' attorney notified them on October 31, 1945, that defendant "is back from the service" and "wants to do something about the suit against him." From said October 31st to February 10, 1948, when defendant filed his motion to dismiss the action, a period of approximately 2¼ years elapsed. Therefore, even if it be assumed that appellants should be excused, under the provisions of said act, from attempting to bring the action to trial during the period of approximately 3 years from the filing of the com-

plaint to said October 31st, there was a period of approximately 2¼ years thereafter during which appellants failed to exercise due diligence to bring the action to trial. It appears that appellants, upon being informed by their attorney that the defendant was back from the service and wanted to do something about the suit, immediately engaged in conduct which was calculated to delay the trial. In the letter of October 31, 1945, wherein appellants' attorney so informed them, he also stated in effect that if he remained their attorney he would have to accept service on behalf of appellants. Thereupon appellants discontinued the services of the attorney and filed a document which recited that they would represent themselves in the action, but they did not disclose in that document or at all their residence addresses or any address where service of process could be made upon them personally. After defendant had obtained an order of court directing the appellants to file a notice of their residence addresses or other addresses where personal service of process could be made upon them, and after said order had been served upon appellants by mail sent to their post office box address, they did not comply with the order. It would seem that if they were trying diligently to bring the action to trial they would have furnished such addresses. Instead of complying with the order, they appealed therefrom, and then they filed in the Supreme Court a petition for a writ of mandate commanding the superior court to vacate said order. (They were unsuccessful in the matters of the appeal and the petition.) The statement in the affidavit of defendant, which he filed on November 15, 1945, in support of his application for said order of court, that he "desires to have this action disposed of" was a clear indication that defendant was not then relying upon the provisions of the Soldiers' and Sailors' Civil Relief Act, and that the action could be brought to trial without involving those provisions. Reasonable diligence on the part of appellants required that they examine that affidavit. It is reasonable to infer that appellants knew, during a period of approximately 2¼ years immediately preceding the dismissal, that the action could be brought to trial irrespective of the provisions of said act. The appellants did nothing during that period to bring the action to trial, but on the contrary it appears that they endeavored to delay the trial. "The duty rests upon the plaintiff at every stage of the proceeding, to use diligence and to expedite his case to final determination." Smith v. Wiget, 75 Cal.App.2d 591, 595, 171 P.2d 563, 565. Under the provisions of section 583 of the Code of Civil Procedure, as above stated, a court may in its discretion dismiss an action for want of prosecution whenever the plaintiff has failed for two years after the action is filed to bring the action to trial. The trial court exercised sound discretion in dismissing this action for want of prosecution.

[5] Appellants filed herein a petition for augmentation of the record, and this court deferred ruling on the petition until the appeal was considered on its merits. It was sought by the petition to include in the record a portion of the oral proceedings had at the hearing of the motion to dismiss. That portion of the proceedings was a statement to the effect that Mr. Thomas Hadges was authorized to appear for the plaintiffs. That portion of the proceedings is not a necessary part of the record. It was also sought by the petition to include in the record photostatic copies of three letters written by one of plaintiffs' attorneys. Those letters were not before the court upon the hearing of the motion to dismiss and they should not be included in the record. Also it was sought to include in the record the verification of the complaint, and an affidavit of defendant in opposition to the petition for a writ of mandamus, and the petition for said writ. These were not necessary and material parts of the record. The petition for augmentation should be denied.

The order granting defendant's motion to dismiss the action, and the order dismissing the action, are affirmed. The petition for augmentation of the record is denied.

SHINN, P. J., and VALLÉE, J., concur.

95 Cal.App.2d 320

ROBINSON v. KELLY et al.

No. 14115.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1949.

Action by Amos H. Robinson against Howard O. Kelly and another, individually and as copartners doing business under the name and style of Kelly & Moyer Trucking Company, and others for injuries sustained by plaintiff in collision between his automobile and named defendants' truck and trailer.

The Superior Court for San Benito County, A. M. Runnells, J., entered judgment on a verdict in favor of defendants and plaintiff appealed.

The District Court of Appeal, Bray, J., held that the evidence was sufficient to sustain the verdict and that record disclosed no error in the admission or exclusion of evidence or in the instructions and affirmed the judgment.

1. Automobiles 🔑244(42)

In action for injuries sustained by driver of automobile in collision with defendants' truck and trailer proceeding in opposite direction at night, evidence that automobile crossed center line and collided with truck on its righthand side of highway sustained verdict for defendants.

2. Trial 🔑56

In action for injuries sustained in automobile-truck collision, where a map made by surveyor showing location of glass and gouge marks in pavement as pointed out to him by plaintiff's wife had been introduced in evidence and location of glass and marks was not in dispute, refusal to permit plaintiff's son to testify as to location of glass and gouge marks as pointed out to him by mother was not error.

3. Trial 🔑110

Overruling objection to testimony in the form of a request that adverse counsel not ask witness any question as to a particular matter because on cross-examination witness had stated he did not know was not error.

4. Evidence 🔑545

Evidence established qualification of private investigator to testify as to the type of mark an A-frame of wrecked automobile would make on pavement, over objection that investigator was not qualified as a mechanical expert.

5. Appeal and error 🔑882(7)

Plaintiff could not object to examination of witness for defendant in relation to a subject upon which plaintiff had previously examined the witness at length on ground that witness was not qualified as an expert, even though court had previously stated that witness was not an expert, particularly where witness's qualifications as an expert had thereafter been given and plaintiff had not objected to his testifying on the very subject to which court was referring.

6. Trial 🔑49

Trial court's statement that witness was not an expert on mental condition did not apply to witness' qualification to express his opinion as an expert on mechanical matters.

7. Witnesses 🔑245, 282½

Allowing a witness to repeat some of his testimony is a matter entirely within the discretion of trial court.

8. Evidence 🔑474(15)

Permitting a witness, admittedly not qualified as an expert on grades, to describe the fact that road had small rises and small dips and the distances between was not error.

9. Automobiles 🔑207

Driving vehicle across center line onto lefthand side of highway without excuse, except under conditions specified in statute, constitutes "negligence" as a matter of law. Vehicle Code, § 525.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

10. Automobiles 🔑246(25)

Where plaintiff contended that he drove automobile on righthand side of road and offered no excuse for being on wrong side of highway, instructing jury to find for defendants if plaintiff violated statute requiring vehicles to be driven upon right half of roadway except under specified conditions was proper without additional instruction that situations may exist in which it is not necessarily negligence to drive on left side of highway. Vehicle Code § 525.

11. Negligence ⚿140

Instruction on unavoidable accident was not erroneous as telling jury to find for defendants regardless of any act of negligence of defendants.

12. Automobiles ⚿245(79)
Evidence ⚿7

Court may not take judicial notice or hold as a matter of law that a motorist cannot be blinded by a truck's normal lights on a dark night.

13. Automobiles ⚿245(90)

Where there was evidence that motorist had admitted being blinded by lights of approaching truck, whether proximate cause of collision with truck was motorist's failure to stop, slacken speed, or place himself in a position from which he could see the road was a question for jury.

14. Negligence ⚿117

Defendant may raise defense of contributory negligence in addition to that of denial of his own negligence and by relying on contributory negligence of plaintiff he does not admit his own negligence.

15. Trial ⚿228(1)

Each instruction need not embody every fact or element essential to sustain or defeat an action or cover the entire case, since each instruction must be regarded in relation to the other instructions, and it is sufficient if instructions as a whole substantially and correctly cover the law applicable to the issues.

◆

J. Maxwell Peyser, San Francisco, for plaintiff and appellant.

Garth V. Lacey, Salinas, for defendants and respondents.

BRAY, Justice.

In an action for damages for personal injuries received by the driver of a passenger car in collision with a truck and trailer, the jury brought in a verdict in favor of defendants. Plaintiff appealed from the judgment entered thereon.

Questions Involved:

(1) Alleged insufficiency of the evidence. (2) Alleged error in admission and exclusion of evidence. (3) Alleged error in instructions.

1. Evidence Sufficient.

There was a direct conflict in the testimony, particularly that of defendant Shobe, driver of the truck, as opposed to that of plaintiff and his family. The accident took place on the Chittenden Pass road, which runs generally east and west, between Watsonville and San Juan. At the particular point where the accident occurred the road is in a north-south position, westbound traffic moving northward. At about 7:30 p. m. on January 30, 1948, a dark evening with no fog or rain, plaintiff was proceeding toward Watsonville, driving a 1937 Chrysler containing himself and his wife in the front seat, and two grandchildren in the back seat. At the same time defendants' truck, driven by defendant Shobe, was proceeding from Watsonville toward San Juan. The truck was actually a truck and trailer, attached by a tongue, the whole (including a load of limestone) weighing about 35 tons. Plaintiff was driving at about 30 miles per hour, and the truck was travelling at about 40 miles per hour. Plaintiff at that time did not have a driver's license. (What bearing this had on the accident does not appear.) Although plaintiff, his wife and a grandchild testified that the lights of the truck were bright and that the Chrysler lights were blinking, Shobe testified that the truck's lights were on the low beam and that he did not see the Chrysler lights blinking. Shobe claimed that the truck at all times was to the right of the center line and that when the two vehicles were about 10 feet apart, the car came directly over and struck the truck. The left front hub cap of the truck and the left front wheel of the Chrysler collided. Plaintiff testified that his car was 2 feet to the right of the center line, and both he and Mrs. Robinson stated that immediately before the impact he pulled farther to the right. His wife and grandchild testified that the car was on its right side of the road and that the truck straddled or crossed the white line and struck the car. Shobe stopped his truck off the highway some distance past the spot of the accident, returned and gave first aid treatment to plaintiff, who was badly injured. (His arm was amputated immediately after arrival at the hospital.) The Chrysler ended up against the bank on its wrong side of the highway. The only actual witnesses of the accident were plaintiff and his family and defendant Shobe. Highway Patrolman Gibson, who arrived there shortly after the accident, found a wide mark on the road which he said (without objection) was made by the rim of the left front wheel of the Chrysler (the tire was flattened in the collision). This mark began 3½ inches to the left of the center line (facing in the direction the Chrysler was going) and ran in an unbroken line to the left front wheel of the wrecked car. He also found broken glass and debris lying on both sides of the center line. On cross-examination he was asked his opinion of where the point of impact was. He placed it at a point on the map which would indicate that the left front of the Chrysler was over the center line at the time of impact. Defendants called one McPike, an "independent investigator" who inspected the scene early the next morning. He found a gouge mark in the pavement directly on the center line, also one 3¾ inches from the center line on the Chrysler side of the road, which ran to the place where the Chrysler had stopped after the accident. This mark, in his opinion, was caused by the broken spring set of the A-frame of the car. Patrolman Gibson also testified that the night of the accident Mrs. Robinson stated to him that she was blinded by the truck lights and did not know what part of the road the car was on. She denied making such statement.

[1] So far as the sufficiency of the evidence is concerned, the testimony of defendant Shobe alone, if believed by the jury (and it evidently was), was sufficient to sustain the verdict. Moreover, the testimony of the witnesses Gibson and McPike corroborated him, while the testimony of plaintiff and the members of his family was substantially uncorroborated.

2. Alleged Error in Admission and Exclusion of Evidence.

[2] Mrs. Robinson went with her son, Edgar Robinson, to the scene of the accident the next morning. He testified that she pointed out to him the two gouge marks in the highway. He was then shown a photograph, "Plaintiff's Exhibit 7," and was asked whether the gouge mark on the right side of the center line showed in the photograph. Thereupon defendants objected that he was "only testifying as to what somebody showed him." The court then asked him questions which elicited the fact that the time he was there was before noon. The following then occurred:

"Q. And all you are testifying to now is the result of an investigation with your mother? A. Not exactly, sir.

"Q. What else? A. There was the glass.

"Q. She showed you the glass? A. Yes, sir.

"Q. And she pointed out the indentation on the highway? A. Yes.

"Q. And that is what your testimnoy consists of?

"Mr. Peyser [counsel for plaintiff]: And I am going—

"The Court: You have corroborated it two or three times. The objection is sustained." There was no error under the circumstances of the case in the court declining to permit further testimony concerning the location of the glass and the gouge marks. There was introduced in evidence a map (plaintiff's Exhibit 8) made by a surveyor on which was printed the legend "Location of Glass as Indicated by Mrs. Robinson" and a mark showing it to be on the center line. The "Gouge Marks on Pavement" as well as the "Location of Glass" were drawn on the map by the surveyor after they were pointed out to him on the ground by Mrs. Robinson. Patrolman Gibson located the mark which he saw that night as commencing with one of these gouge marks. McPike adopted the gouge marks on the map as those seen by him the next day, although he testified to an additional mark 3 feet to the right of these marks. Therefore, there was no dispute as to the location of both the glass and the two gouge marks. Having the son again locate them as pointed out to him by his mother would have added nothing to the case, even though the court allowed McPike to testify to these marks, as well as others, found by him the next day.

[3] Plaintiff objects to the admission of "the testimony of the so-called investigator Beldon McPike. (R.T. 182 to 189, lines 1–19.)" An examination of this reference to the transcript discloses McPike was under cross-examination by plaintiff from pages 182 to the bottom of page 187. How plaintiff can attack the testimony which he brought out himself does not appear. On page 188, defendants asked McPike the relation of the A-frame to the gouge marks and the witness explained his theory at some length. Then the following occurred. McPike had just stated: "Those marks were 3 feet to the center line. The left wheels of that car, when the right wheels were 3 feet from the center line, the left wheels must have been 1 foot, 10 inches"; and plaintiff's counsel stated: "I'll ask counsel not to ask the witness any questions as to that. When I asked him about that he said he didn't know and I said, 'Well you are an expert', and he said, 'I am'." The court did not err in overruling this type of objection.

[4-6] Plaintiff complains that the court overruled plaintiff's objections as shown in R.T. 181, 24–26; 183, 4–13. An examination of the transcript at the designated pages shows no objections having been made. Later, on two occasions defendants asked McPike's opinion as to what part of the A-frame caused the gouge marks. Plaintiff objected on the ground that the witness was not qualified as a mechanical expert. The objections were overruled. McPike had previously testified without objection as an expert as to the fact that the gouge and other marks showed where the car travelled after the accident "and bolted over to the bank," and given his opinion as to whether the Chrysler was ever in a spot where a witness named Rose claimed it was. He was asked whether from his experience he would say that the collision between the car and the heavy truck would affect the car in a certain way. An objection by plaintiff was sustained, the court stating that McPike was not an expert. He was then asked the number of automobile accidents he had investigated in his 32 years of investigation, and he answered "a number of thousand of them." He was then asked if he was qualified to say, in his "experience as an expert investigator" what would be the effect of two machines striking each other from opposite directions. No objection was made to this and similar questions, all of which he answered. Plaintiff then brought out on recross-examination that the witness had had certain experience in repairing automobiles in an automobile shop, and also a year and a half prior had fitted an A-frame in his own car. At great length plaintiff interrogated him concerning whether the gouge mark was caused by the rim or tire of the Chrysler, or its A-frame. (The witness had not seen the car; only the photographs of it in its damaged condition.) Plaintiff interrogated him at great length concerning all the marks which McPike found at the scene of the accident and how they got there. All this had occurred before plaintiff objected. McPike testified without objection on several subjects as to which it is questionable if they were the subject of expert testimony, or if they were whether he had qualified as an expert. However, on this subject of the type of mark an A-frame would make, he showed sufficient qualification to make his opinion admissible. In any event, plaintiff had previously examined him at length up-

on the subject; hence his objection came too late. Plaintiff stresses the fact that on two occasions the court stated that McPike was not an expert. This fact would not help him in view of his failure to make timely objection. Moreover, the first time the court made such statement was with reference to the physical effect of two machines meeting, and thereafter the witness's qualifications were given and plaintiff made no objection to his testifying on the very subject to which the court was referring. The second instance was when the court was referring to the fact that McPike was not an expert on mental condition, and has nothing to do with his opinion on mechanical matters.

[7, 8] McPike testified to his own observation of the contour of the road. Later, he was asked to "describe the contour" with relation to this diagram. Plaintiff objected on the ground that it had already been asked and answered on direct examination. The court overruled the objection, stating, "The court is not quite clear as to the testimony that has been given." Allowing a witness to repeat some of his testimony is a matter entirely in the discretion of the trial court. The witness then pointed to the map and started to describe the contour of the road, and said, "It rises about 7 feet, and you come over the crest and settle down to about a 3 or 4-foot grade, and then you come to a long piece of level—(No more of answer given)." Plaintiff interrupted, objecting that the witness was not qualified as engineer or otherwise to testify to grades. The court sustained the objection. Then discussion followed, and the court said "Proceed." Defendants' counsel stated that he was not asking him as an expert on grades and then asked him if he could tell about the up and down contour of the road. No objection was made. The witness then proceeded to describe the fact that the road had "small rises and small dips" and the distances between. There was no error here.

Instructions.

[9, 10] The court gave section 525 of the Vehicle Code which provides that a vehicle shall be driven upon the right half of roadways of sufficient width, except under certain conditions therein set forth (defendants' instruction 1), and defendants' instruction 8 to the effect that if plaintiff violated that section it would be negligence as a matter of law and if such negligence was the proximate cause of the accident, the verdict should be for defendants. Plaintiff's objection to this instruction is that the court should have told the jury that in addition to the exceptions set forth in the act, there may be situations in which it is not necessarily negligence to drive on the left side of the highway, citing Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143, and other cases where there was evidence showing good reason for the car being out of its own lane. For example, in the Finney case the plaintiff testified she left her lane for the purpose of avoiding a collision with defendant's car. The rule of those cases is not applicable here. Plaintiff and his witnesses contended that he at no time left his own side of the highway. Either this was true, or he was on the wrong side of the road. The jury did not believe that he was on his own side of the road, and as he attempted no excuse for being on the wrong side, he was negligent as a matter of law in crossing the center line. Justifiable crossing of the line was not an issue in the case. These instructions, therefore, under the circumstances of this case, were proper.

[11] The court gave an instruction on unavoidable accident (defendants' instruction 17). Plaintiff contends that this instruction told the jury that it must find a verdict for defendants regardless of any act of negligence on the part of defendants. This contention overlooks that portion of the instruction which reads, referring to the terms "unavoidable or inevitable accident," "They simply denote an accident that occurred without having been proximately caused by negligence."

[12] Defendants' instruction 14, after stating that a driver must anticipate the presence of other drivers and keep his car under such control as will enable him to avoid a collision with another person using proper care, then stated that this duty

is not lessened if the driver is blinded by the headlights of an approaching car, and if blinded is required to "stop, or slacken his speed, or place himself in a position from which he could see the road over which he was driving. If you find that the plaintiff was blinded by lights of defendant's truck and that he drove across the center of the highway as a result thereof, and that his injuries were occasioned as a proximate result thereof, and that the *defendant was free of negligence*" the verdict should be for defendants. This instruction is based on the rule set forth in Meads v. Deener, 128 Cal.App. 328, 17 P.2d 198. The emphasis is that of plaintiff's opening brief in which he contends that by including this line in the instruction, the court suggested to the jury that they might find (a) that plaintiff was blinded and failed to use due care, and (b) that defendants were free from negligence. Plaintiff argues that the jury could not reasonably have made both findings, because plaintiff could only have been blinded if Shobe was using his bright, long-range lights, contrary to Shobe's own testimony. Plaintiff contends that "dimmers could not possibly be blinding." However, that is not so self-evident that we may take judicial notice of it or hold as a matter of law that a driver cannot be blinded by a truck's normal lights on a dark night.

[13] There was testimony to justify the instruction given. McPike testified that plaintiff had stated that he was blinded by the truck lights, and that he could not see the center line. Although plaintiff denied making such statement and insisted that he was not blinded by the lights, it was for the jury to decide whether in the light of such admission (if the jury found he made it) the proximate cause of the accident was plaintiff's failure to meet the standard of care set forth in the instruction.

[14] Plaintiff contends that in view of the fact that the court gave instructions on contributory negligence it had no right to give other instructions requiring the jury to find defendants guilty of negligence before awarding a judgment against them. The doctrine of contributory negligence assumes that defendants were negligent, says plaintiff, and therefore the giving of instructions on the subject was a finding that defendants were negligent. Plaintiff even goes to the extent of claiming that the testimony of Shobe must be completely disregarded because by pleading this defense and having the court instruct on it, defendants admit their negligence. Such is not the effect of that defense. It is a defense which a defendant has the right to raise in addition to that of denial of negligence. The effect of the instructions is that if the jury finds the defendants negligent and that such negligence was a proximate cause of the accident, it then must determine if plaintiff was also negligent, and if so, whether his negligence was also a proximate cause of the accident. Giving instructions on contributory negligence was proper.

[15] In his criticism of the instructions given, plaintiff regards most of them as isolated instructions without considering that each instruction must be regarded in relation to the other instructions. As said in Megee v. Fasulis, 65 Cal.App.2d 94 at page 99, 150 P.2d 281, 284: "It is not necessary that each instruction embody every fact or element essential to sustain or defeat an action or that it cover the entire case. It is sufficient if the instructions, as a whole, substantially and correctly cover the law applicable to the issues."

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

EL RIO OILS (CANADA) Limited v.
CHASE et al.
Civ. 16864.

District Court of Appeal, Second District,
Division 2, California.
Dec. 29, 1949.

Rehearing Denied Jan. 16, 1950.

Hearing Denied Feb. 23, 1950.

Action by El Rio Oils (Canada) Limited, a Delaware corporation against J. Warren Chase and others for declaratory relief to determine the basis on which royalty should be paid under an oil and gas lease wherein the defendants filed a cross-complaint seeking forfeiture of the lease.

The Superior Court of Ventura County, Ernest D. Wagner, J., rendered a judgment determining the manner of computing the royalty to be paid to defendant and the plaintiff appealed and from the portion of the judgment relieving plaintiff from default and forfeiture of lease, defendants appeal.

The District Court of Appeal, Wilson, J., held that lessee was required to account for the oil as it came from the well although it injected distillate for purpose of increasing production but that lessee was properly granted relief from forfeiture in view of fact that it had acted honestly and in good faith in taking position that injection of distillate into wells was treatment for which it was entitled to make a deduction from the royalty and affirmed the judgment.

Prior opinion 207 P.2d 885.

McComb, J., dissented.

1. Appeal and error 🔑989, 1010(1)

If there is any substantial evidence in record, contradicted or uncontradicted, which will support the trial court's finding of fact, an appellate court will not consider evidence in conflict therewith and will not disturb the trial court's finding.

2. Mines and minerals 🔑79(7)

In lessor's cross-action for forfeiture of oil and gas lease, evidence sustained finding that lessee improperly attempted to charge lessors with a proportionate share of lessee's overhead and of expense of injecting distillate into wells for purpose of aiding in pumping and of increasing production.

3. Mines and minerals 🔑79(3)

Where lessors exercised option to take royalty in kind but lessee had injected distillate into oil well for purpose of increasing production, lessee was required to account for the oil as it came from the well.

4. Mines and minerals 🔑79(7)

In lessors' cross-action for forfeiture of oil and gas lease, evidence sustained finding that lessee had entered into agreement with third party to accept lower price for oil produced than lessee would otherwise have obtained for purpose of evading obligation to pay full royalty due lessors.

5. Mines and minerals 🔑79(7)

Where oil and gas lease provided that royalty was to be paid on value of all oil at posted market price in district, but there was no posted market price in district, requirement of judgment that money royalty be based on price fixed by contract between lessee and buyer of oil, or by market value of oil whichever was the higher was proper.

6. Appeal and error 🔑173(10)

Where statute of limitations was not pleaded nor issue raised in any manner in trial court, such defense was waived and could not be presented on appeal.

7. Mines and minerals 🔑79(7)

In lessors' cross-action for forfeiture of oil and gas lease, evidence sustained finding that lessee refused to pay royalties in full solely by reason of its honest belief that it did not owe the amount and was not obligated by the lease to pay it.

8. Mines and minerals 🔑79(6)

In lessee's action for declaratory judgment and lessors' cross-action for forfeiture of oil and gas lease, where the trial court found that lessee erroneously but honestly and in good faith took position that injection of distillate into oil wells was treatment for which it was entitled to make a deduction from royalty, lessee was properly granted relief from forfeiture on payment of full amount of royalties due lessors.

9. Judgment ⚿18(2)

Oil lessee's pleading for declaratory relief was a sufficient indication of its willingness to abide by judgment of court as to its obligation under lease and to pay according to court's construction of contract and allegation of ability and willingness to pay amount due was not necessary to justify relief from forfeiture of lease.

10. Mines and minerals ⚿79(7)

The fact that lessee did not ask relief from forfeiture of oil and gas lease, did not preclude granting of such relief where existence of ground for forfeiture was denied at all times by lessee and was not established until judgment was entered.

◆

William A. Reppy, Oxnard, Dolley, Knight, Woods & Hightower, Los Angeles, for appellant El Rio Oils (Canada) Limited.

Durley, Todd & Fox, Oxnard, Churchill, Teague & Romney, E. Perry Churchill, Ventura, for respondents Chase.

WILSON, Justice.

Plaintiff, by its appeal, seeks reversal of the judgment insofar as it determines the manner of computing the royalty to be paid to defendants pursuant to an oil lease from the latter. Defendants have appealed from that portion of the judgment relieving plaintiff from default and forfeiture of the lease for noncompliance with its terms.

Plaintiff (referred to as lessee) is the assignee of a lease executed by defendants to A. A. Weiss, dated January 16, 1937, of a certain parcel of land for the purpose of exploring and drilling for oil and other petroleum products. The lease contained, among others, these provisions:

"The Lessee shall pay Lessor, as royalty, for oil produced, an equal one-eighth (⅛) part of the value of all oil which may be produced and saved from said leased lands after deducting therefrom all oil used in the operation and development of said property and in pumping products from the said property elsewhere and after making the customary deductions for treatment, temperature, water and b. s., at the posted market in the district in which the leased premises are located, for oil of like gravity, on the day the oil is run into the pipe line or tank; settlement to be made by Lessee on or before the 20th day of each calendar month for accrued royalty for the preceding month, or at Lessor's option, exercised not oftener than once in any one calendar year, upon six months previous notice, Lessee shall deliver into tanks maintained by Lessee on the leased premises or at the mouth of the well to pipe line designated by Lessor, Lessor's one-eighth part of said oil storage limited to thirty (30) days (this last provision being for the protection of the Lessor to insure him against an imposition of a fictitious price).

"Lessee shall pay Lessor as royalty on gas, one-eighth (⅛) of the net proceeds derived from the sale of gas from said property while same is being sold or used off the premises; settlement to be made by Lessee on or before the 20th day of each calendar month for gas sold during the preceding month, but nothing herein contained shall require lessee to market gas from said leased lands, unless said lands are being operated as a gas field. Lessee shall have the right, free of cost to him, to use gas required in the operation and development of said property and in the production and lifting of oil from said wells, and in pumping products from said property elsewhere."

Lessee completed two wells on the property. The oil obtained from them was of a low gravity and heavy consistency. Because of its low viscosity it was difficult to pump the oil from the wells. Lessee found few purchasers interested in buying the type of crude oil produced. After the first year of production lessee adopted a plan of injecting distillate into the wells in such a manner that it mixed with and thinned the native crude oil and made it easier to pump. Because of this method of production a great deal more native crude oil was produced than before. The mixture resulting from the injection of distillate was slightly more valuable than the native crude but the cost of the distillate injected was greatly in excess of any increase in the value of the native crude oil.

Lessee's purpose in injecting the distillate was to aid in the pumping and production of native oil and not to raise the gravity of the crude.

After this practice had been commenced lessee rendered a statement to lessors in which it deducted from lessors' royalty one eighth of the cost of the distillate injected into the wells and charged lessors 5 cents for each royalty barrel of oil for what was termed a "heating and treating" charge. The oil injected was neither heated nor treated by lessee. After objection by lessors to the deduction for heating and treating lessee continued to make the same deduction of 5 cents a barrel but termed it "Royalty owner's share of operating overhead."

A dispute ensued which continued over a period of time between lessee and lessors relative to the basis upon which the royalty due lessors should be computed. Lessee having become in default under the terms of the lease for nonpayment of royalty in the sum of $5,229.59, notice of default and demand for payment within 30 days as provided in the lease was given by lessors. Lessee neither paid nor tendered the amount specified in the notice but filed the instant action for declaratory relief alleging the existence of a controversy relating to the rights of the parties under the lease and the notice of default and asking a declaration of plaintiff's rights and duties thereunder. After the expiration of the 30-day period provided in the lease and specified in the notice lessee paid the sum mentioned into court but conditioned that it should be paid out only pursuant to final judgment in the action or to stipulation of the parties. Lessors filed a cross-complaint seeking forfeiture of the lease.

Findings of Fact.

The findings necessary to a determination of these appeals are that:

1. Lessee "voluntarily failed and refused to pay the full amount of said royalties; * * * voluntarily failed and refused to pay" within 30 days after notice of default the sum of $5,229.59, which was due to lessors as a royalty under the terms of the lease.

2. Lessee entered into an agreement with Douglas Oil Company and accepted a lower stated price for oil together with the obligation of Douglas Oil Company to deliver distillate as therein provided, for the purpose of evading its obligation to bear the entire production expense of injecting distillate in the wells, and for the purpose of attempting to establish an indirect method of charging lessors with a share of such expense.

3. Lessee at all times honestly contended and asserted that it did not owe and was not obligated under the terms of the lease to pay the sum of $5,229.59 to lessors and that it had the right to make the deductions which it did make in computing the royalty, and that an honest dispute existed between lessee and lessors in regard thereto.

4. Lessee failed and refused to pay the royalty and the sum demanded by the notice of default for the sole reason that it contended and believed it did not owe the amount and was not obligated under the terms of the lease to pay it, and for that reason lessee voluntarily refused to pay the royalties in full during the period from March 1, 1944, to and including the trial of the action.

5. Lessee has at all times contended and at the trial of the case did contend that it was in no way in default under the terms of the lease.

6. At the trial of the action lessee accounted for its production and sale of oil produced from the wells and for distillate delivered to it by Douglas Oil Company, but lessee claimed and asserted at the trial that it was obligated to pay royalty on oil sold to Douglas Oil Company only upon the net barrels of oil after deducting distillate delivered to it and at the rate of 53¢ per barrel thereon.

Judgments.

1. A judgment was signed and filed on February 27, 1948, which decreed among other things that:

(a) Lessors recover from lessee the sum of $5,229.59 plus interest and other royalties.

(b) Lessee's right, title and interest under the lease has been terminated and forfeited pursuant to the terms of the lease and lessors' title to the premises is quieted against all claims of lessee; provided that lessee shall be relieved from the forfeiture and reinstated as lessee under the lease in the event that it shall, within 15 days from entry of judgment, pay to the clerk of the court for the benefit of lessors all sums of money declared by the judgment to be owing from lessee.

(c) The court reserves jurisdiction to determine whether lessee has fulfilled and performed the terms and conditions of the judgment in order to be entitled to relief from forfeiture.

2. On April 13, 1948, a final judgment was filed decreeing that:

(a) Lessee had deposited with the clerk of the court for the account of lessors all moneys found by the court to be owing from lessee to lessors.

(b) Lessee should be and is relieved from the forfeiture of the lease and should be and is reinstated as lessee thereunder.

Appeals.

1. Lessee appeals from the whole of the judgment filed February 27, 1948.

2. Lessors appeal from the provisions of both judgments (a) determining that lessee may be relieved from the forfeiture of the lease upon conditions above related, granting such relief and reinstating lessee under the lease; (b) failing to quiet title to the property in lessors against lessee.

Lessee's Appeal.

Five contentions are presented by lessee in its briefs:

1. It is contended that lessee, in computing cash royalty due lessors, is entitled under the terms of the lease to make a deduction for a proportionate part of the cost of injecting distillate into the well.

The lease provides that lessee shall pay lessors a one-eight part on all oil produced and saved "after making the customary deductions for treatment, temperature, water and b. s." The evidence discloses that there was no treatment of the oil in any sense of the word. The oil was not subjected to any processing. The injection of distillate was not a treatment of the oil but was for the purpose of increasing production—to obtain oil in paying quantities. Likewise, evidence was introduced showing it was the custom in the oil industry that the expense of injecting distillate as an aid in pumping and to increase production should be borne exclusively by lessee and that the latter should pay its own "overhead" expense. In the absence of an agreement to the contrary it was the custom in the oil industry in computing royalty that the lessee should not charge any portion of its overhead expense to the lessor.

[1] It is the rule that if there is any substantial evidence in the record, contradicted or uncontradicted, which will support the trial court's finding of fact an appellate court will not consider evidence in conflict therewith and will not disturb the trial court's finding.

[2] The evidence sustains the finding that lessee improperly attempted to charge lessors with a proportionate share of its overhead and of the expense of injecting distillate into the wells for the purpose of increasing production.

[3] 2. Lessee maintains that when lessors elect to take their royalty in kind they are entitled only to the crude petroleum in its natural state and are not entitled to take the oil as produced from the wells without deducting the distillate injected into it by lessee.

The lease provides that lessors at their option shall have the right to take their royalty in kind which lessee shall deliver into tanks maintained by it "or at the mouth of the well" to pipe line designated by lessors. The court decreed that in computing the total volume of monthly production and one-eight part thereof the volume of distillate injected into the well by lessee during such month may be deducted. The evidence shows that there are other methods of increasing the flow of oil than the use of distillate—injection of steam is one. Since lessee need not have used distillate but nevertheless did so it must account for the oil as it came from the well. The objection made to this portion of the decree is untenable. The judgment is in accordance with the lease.

[4] 3. Lessee argues that it is not proper to include as a part of the basis for computing the cash royalty the theoretical value to lessee of a covenant in an oil purchase contract to return to lessee distillate equal in amount to that injected into the well.

The court found, upon substantial evidence, that lessee entered into the agreement with Douglas Oil Company whereunder that company paid a lower price for oil and agreed to deliver distillate to lessee for the purpose of evading its obligation to pay royalty to lessors as provided in the lease, thus indirectly charging lessors with a share of the cost of injecting distillate as a production cost. The benefit obtained by lessee from the Douglas contract was at the expense of the landowners. The judgment prevents such a result.

[5] 4. Lessee further contends that the requirement that the money royalty be based upon the contract price or market value of the oil, whichever is higher, is contrary to the provisions of the lease.

The lease provides that royalty is to be paid upon the "value of all oil * * * at the posted market price in the district in which the leased premises are located, for oil of like gravity, on the day the oil is run into the pipe line or tank."

The judgment provides that lessors' right to money royalties is not limited by the price or consideration received by lessee under the existing contract with Douglas Oil Company and that if there be no posted market price royalty shall be computed upon the price or consideration received by lessee under its contract with Douglas Oil Company or upon the fair market value, whichever shall be the higher. There is no posted price in the field in which the wells in question are located. This provision of the judgment insures to lessors the royalty to which they are entitled under the terms of the lease. Since there is no posted price the royalty must be computed on some other basis. The amount to be received by lessors should not be permitted to be based on any price, however low, for which lessee might sell. If the fair market price is higher than lessee's selling price lessors are entitled to one eight of it. If lessee is fortunate enough to have a contract that yields more than the market price lessors are entitled to benefit from such contract. The judgment is a barrier to any attempt by lessee to evade payment to lessors of their fair share of the proceeds of the wells.

[6] 5. Not separately stated nor specially urged is lessee's assertion that that portion of the royalty which became due more than four years prior to the filing of lessors' cross-complaint should not have been included in the judgment. Since the statute of limitations was not pleaded by lessee nor the issue raised in any manner in the trial court such defense has been waived. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 744–745, 47 P.2d 273.

Lessors' Appeal.

Lessors contend that the court erred in (1) granting lessee relief from the forfeiture of the lease upon condition that it pay into court the full amount of the money judgment rendered against it; (2) reinstating lessee to its rights and privileges under the lease after it had complied with the condition; (3) failing to quiet lessors' title against lessee.

[7, 8] The court found as a fact that lessee at all times had been honest in its contention that it was not obligated by the terms of the lease to pay the amount found by the court to be due and unpaid to lessors; that an honest dispute had existed between the parties concerning the computation of the royalty; that while lessee had voluntarily refused to pay the royalties in full its refusal was solely by reason of its honest contention and belief it did not owe the amount and was not obligated by the lease to pay it.

In relieving lessee from forfeiture the court deemed that its honest belief the money was not owing to lessors was a good and sufficient reason for not having paid it. Why should one be compelled to pay a debt until there has been an adjudication of the rights of the parties if he in good faith denies the indebtedness? When the dispute reached the point where notice of default was served lessee commenced this action for declaratory relief for the purpose of obtaining such adjudication. Lessee contended before the action was filed, in its pleadings, at the trial, and contends on this appeal it is not liable for the amount awarded to lessors. The trial court had before it the evidence, oral and documentary, had the opportunity of observing the witnesses and the manner in which their testimony was given, and evaluated it. It is not within our province to assume or to override the prerogatives of the trial court. Substantial evidence sustains the finding and the usual rule in such a case must prevail here.

An elaborate opinion was filed by the trial judge concerning all features of the case, including the evidence relating to the dispute and lessee's belief in its position, in which it is said: "Under the Court's broad equity powers, and this is a case in equity, the Court is of the opinion that to declare a forfeiture herein would be harsh and inequitable and not contemplated by our law under the particular facts of the case."

The trial court's findings that lessee was wrong in its contentions regarding the construction of the lease and our affirmance of the judgment by this opinion are not determinative that lessee was not acting honestly and in good faith in the position it took that the injection of distillate into the wells was "treatment" for which it was entitled to make a deduction from the royalty. "Treat" is defined in Webster's New International Dictionary, 1947 Ed., as "To subject to some action, as of a chemical reagent; as, to *treat* a substance with sulphuric acid; often to subject (a natural or manufactured article) to some process to improve its appearance, taste, usefulness, etc.; to process; * * *" "Treatment" is defined as "Act, manner, or an instance, of treating, esp. of treating * * * a substance, as in processing; * * *" That there was a further reasonable ground for lessee's contention is evidenced by the fact it had received an opinion from an attorney (not one of counsel in the instant action) advising that its position was well taken. True, lessors furnished a contrary opinion from their attorneys. These opposing opinions did not clarify the situation. They merely muddied a water already turbulant. They did no more than furnish confusion for lessee as to its legal rights and a further reason for refraining from paying a disputed claim until its legality should be determined by the court. The fact that this case is now before us with earnest arguments for both parties may be taken as evidence that the proposition is not to be brushed aside as being without merit.

Lessors refer to the general rule that not only fraud or illegality but any unconscionable conduct will prevent a person from obtaining equitable relief, citing DeGarmo v. Goldman, 19 Cal.2d 755, 764, 123 P.2d 1. This case did not involve forfeiture. The plaintiff sought to have directors of a corporation removed for malfeasance. The court held that in such a case wrongful acts committed by the plaintiff connected with the controversy would bar him from recovery.

Lessors argue that equity will not relieve from forfeiture caused by a willful default; that a voluntary default is willful; that since lessee's default was voluntary it was willful and therefore it is not entitled to reinstatement under its lease. This contention has been covered by the court's findings and by our previous discussion. The court found that lessee intentionally failed to pay the royalty but this does not mean there was a corrupt motive in its failure. Such motive is negated by the finding that lessee was honest in its assertion that it did not owe the amount demanded. Lessors cite Blue Ridge, etc., Co. v. Proctor, 327 Pa. 424, 194 A. 559, as sustaining their contention. In that case a lessee misrepresented its ability to pay rent in order to persuade the lessors to accept a lower rent. After declaration of forfeiture it claimed to be able to pay rent and filed a bill in equity to set aside the forfeiture. That case is not authority in the instant action since (1) there was an inexcusable falsity on the part of the lessee as to its ability to pay, (2) there was no claim that its position had been honestly taken as the court found in the case at bar, (3) the court declared that the plaintiff's conduct was so inconsistent with good faith and fair dealing as to preclude equitable relief—just the opposite of the trial court's findings here. In other cases cited by lessors the parties seeking equitable relief had been guilty of inequitable practices without excuse.

Lessors cite cases in which it is stated that "the rule that forfeitures are not favored in law does not apply to oil and gas leases." Although this general language is found in some of the decisions it will be noted that the cause of the forfeiture was failure to comply with drilling requirements. It is so stated in Slater v. Boyd, 120 Cal.App. 457, 460, 8 P.2d 182. The language above quoted is found in John v. Elberta Oil Co., 124 Cal.App. 744, 747, 13 P.2d 538, and in Hall v. Augur, 82 Cal. App. 594, 600, 256 P. 232, but in each case nonperformance of drilling provisions of the lease caused the forfeiture. Because of the danger that oil and gas from lessors' property might be withdrawn through wells on adjoining lands the rule as to forfeiture for failing to drill wells is as above announced. No cases have been cited to us in which the courts have departed from the rule that equity abhors a forfeiture and will relieve from it except where the lessee has failed to drill wells according to his contract.

[9, 10] Lessors contend that lessee should not be relieved from forfeiture because it did not (1) plead ability and willingness to pay the amount due, (2) tender the amount due with interest thereon, (3) seek relief from forefeiture. Its pleading for declaratory relief was a sufficient indication of its willingness to abide by the judgment of the court as to its obligations under the lease and to pay according to the court's construction of the contract. It paid into court the amount demanded in lessors' notice of default—interest was not mentioned in that notice. The full amount of royalties with interest was paid into court as required by the judgment of February 27, 1948. It was not incumbent on lessee to ask relief from a forfeiture the existence of which (1) was denied at all times by it, (2) was not established until judgment was entered.

The judgment shows an understanding of equitable principles. Lessors will receive complete financial compensation to which they are entitled under the lease—royalties in full with interest thereon. The amount found by the court to have been in default is small indeed as compared with lessee's investment—no doubt one of the factors influencing the court in providing for relief from the forfeiture which it said in its opinion "would be harsh and inequitable and not contemplated by our law under the particular facts of the case." The lease is so construed that there will be no room for dispute hereafter with reference to the matters in contest and lessee's vast investment will not be wiped out.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, Justice.

I dissent and adhere to the conclusions reached by this court in El Rio Oils Ltd. v. Chase, —— Cal.App.2d ——, 207 P.2d 885.

Rehearing denied; McCOMB, J., dissenting.

95 Cal.App.2d 341

JONES v. FEICHTMEIR et al.

Civ. 14167.

District Court of Appeal, First District,
Division 2, California.

Dec. 27, 1949.

Proceeding by Edwin L. Jones against Mrs. A. K. Feichtmeir, and others for a declaratory judgment and for other equitable relief in support of rights under a written sub-lease.

The Superior Court in and for the County of Santa Clara, A. Andreuccetti, Judge Pro Tem, entered judgment for plaintiff, and defendants appealed.

The District Court of Appeal, Nourse, P.J., held that the renewal of the major lease by the lessee's son to defeat option in sub-lease and allow lessee's other son to sub-lease showed lessee and her sons were acting in concert to defeat sub-lessee's rights, and affirmed the judgment.

1. Action 🔑46

A cause of action for equitable relief in relation to a contract may be joined with a cause of action for a declaration of rights and duties of parties under the contract and court under its inherent power to make its judgment effective, has jurisdiction to hear and determine both matters in one trial. Code Civ.Proc. §§ 1060, 1062.

2. Equity 🔑38

Where pleading states facts sufficient to entitle plaintiff to some equitable relief, although not as full as desired in stating a cause for declaratory relief, court will assume jurisdiction of the entire controversy.

3. Equity 🔑38

Where equity obtains jurisdiction of a cause, it will dispose of entire controversy.

4. Declaratory judgment 🔑391

In action for declaration of rights under written sub-lease, where court found that sub-lessee was entitled to exercise his option for renewal of sub-lease, sub-lessee would not be compelled to institute another action to compel acceptance of option, but equity would decree a renewal of the sub-lease in same action. Code Civ.Proc. §§ 1060, 1062.

5. Parties 🔑18, 29

Proper parties to a controversy are not always necessary or indispensable parties. Code Civ.Proc. § 389.

6. Declaratory judgment 🔑296

In action for declaration of rights under written sub-lease, where trial court could save rights of owners without requiring them to appear and defend, owners were not "necessary or indispensable parties". Code Civ.Proc. §§ 389, 1060, 1062.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Necessary or Indispensable Parties".

7. Declaratory Judgment 🔑342

In action for declaration of rights under written sub-lease, whether major lease contained restrictions against subletting, was matter of defense to be shown by proof. Code Civ.Proc. §§ 1060, 1062.

8. Evidence 🔑78

In action for declaration of rights under written sub-lease, where major lease was in possession of lessees, lessees' failure to produce it justified inference that evidence was unfavorable to lessees, and that major lease did not require owner's consent to sub-lease. Code Civ.Proc. §§ 389, 1060, 1062.

9. Declaratory judgment 🔑318

In action for declaration of rights under written sub-lease, where complaint merely detailed statement of facts leading to execution of second major lease to lessee's son to defeat option in sub-lease, fraud was not essential to judgment, and complaint was sufficient without stating that false representations were made to plaintiff upon which he relied to his damage. Code Civ.Proc. §§ 1060, 1062.

10. Declaratory judgment 🔑345, 391

In action for declaration of rights under written sub-lease, where sub-lease contained option to renew if major lease were renewed, renewal of major lease with no restrictions as to sub-lease by lessee's son, to defeat option in sub-lease and allow lessee's other son to sub-lease, showed lessee and her sons were acting in concert to defeat sub-lessee's rights, and equity would decree a renewal of sub-lease. Code Civ.Proc. §§ 1060, 1062.

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Kenneth A. Johnson, Palo Alto, attorney for plaintiff and respondent.

Walter C. Harbert, Los Angeles, Lakin, Rumwell & Spears, Palo Alto, attorneys for defendants and appellants.

NOURSE, Presiding Justice.

Plaintiff sued for a declaratory judgment and for other equitable relief in support of his asserted rights under a written sub-lease under the major lease held by defendants. He had judgment declaring his right to a renewal of his sub-lease and adjudging that the party named in the renewal of the major lease held for the other defendants who had theretofore contracted with him to grant a renewal of his sub-lease.

The facts are not materially controverted. The husband of Mrs. Feichtmeir operated a barber shop on the premises located in the city of Palo Alto until his death. Then Mrs. Feichtmeir leased the premises from the owners, permitted her son Ralph Feichtmeir to conduct a barber shop on one part of the premises, and subleased the other part of the premises to Jones for the conduct of a smoke shop. The sub-lease provided that it was renewable at the option of the sub-lessee if the lessee renewed her lease with the owner or was able to do so. Armin Feichtmeir, an insurance broker, living in the city of Los Angeles, another son of Mrs. A. K. Feichtmeir, arranged to lease the property from the owner for a five year term, commencing upon the termination of the term of Mrs. A. K. Feichtmeir's lease. Thereupon Mrs. A. K. Feichtmeir notified Jones, the sub-lessee, that the original lease would not be renewed with the owner, and that the sub-lease would also be terminated June 30, 1948. Plaintiff Jones notified defendants that he would consider any and all re-leasing by any member of the Feichtmeir family as a renewal of the master lease, and would continue in possession by virtue of the option contained in the sub-lease.

The controversy posed by the pleadings lies in the plaintiff's assertion that the renewal of the master lease in the name of Armin Feichtmeir was but a subterfuge on the part of Mrs. Feichtmeir and her son Ralph designed to defeat the plaintiff's option for a renewal and to enable Ralph to enlarge his barber shop and occupy the entire premises.

The trial court came to the same conclusion and specially found that the manner of the renewal of the master lease was a fraud on the part of the three defendants. It decreed that plaintiff was entitled to a renewal of the sub-lease in accordance with the terms of his option. The evidence and the inferences to be drawn therefrom fully support this finding and the only real issue on this appeal is whether the complaint states a cause of action—that is to say, whether the plaintiff pursued the right remedy.

Proceedings for a declaratory judgment are authorized by section 1060 of the Code of Civil Procedure. In part the section provides for a special form of action "in cases of actual controversy relating to the legal rights and duties of the respective parties". A declaration of such rights and duties may be asked "either alone or with other relief". The remedies provided by the chapter are cumulative and not restrictive of "any remedy, provisional or otherwise" § 1062.

[1] Since the law favors the settlement of all phases of a controversy in one action where possible, there is no objection to the joinder of a cause of action for equitable relief in relation to a contract with a cause of action for a declaration of the rights and duties of the parties under the contract. The jurisdiction of the court to hear and determine both matters cannot be questioned. The right to grant other equitable relief in support of the declaration of the rights and duties of the parties under the writing rests on the sound rule that courts have inherent power to make their judgments effective. 10 Cal.Jur. p. 559.

[2-4] Hence, though a pleading may not be as full as desired in stating a cause for declaratory relief, if it pleads facts sufficient to entitle plaintiff to some equitable relief the court will assume jurisdiction of the entire controversy. This is the rule of Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84; Rolapp v. Federal Building & Loan Ass'n, 11 Cal.App.2d 337, 343, 53 P.2d 974, and similar cases. See gen-

erally, 10 Cal.Jur. p. 559. Here the complaint pleaded the facts relating to respondent's option for a renewal of his sub-lease and the intermingling acts of the appellants designed to defeat that right. The complaint thus states a cause of action for a declaration of the rights of the parties under the respective contracts. The injunctive and mandatory portions of the decree are justified by the well established rule that equity, having obtained jurisdiction of a cause, will dispose of the entire controversy. 10 Cal.Jur. p. 496. The application of the rule to the facts of this case is clear. When the court found that respondent was entitled to exercise his option for a renewal of the sub-lease there was no reason to force him to institute another action to compel acceptance of the option.

[5, 6] The appellants argue that the trial court was without jurisdiction to hear the controversy because all "proper" parties defendant were not sued (i. e., the owners of the land). If this was the argument made in the trial court the adverse ruling was clearly proper. Those who may be "proper" parties to a controversy are not always necessary or indispensable parties. Section 389 of the Code of Civil Procedure reads in part: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights * * *". Under this section the trial court might save the rights of the owners without requiring them to appear and defend. They were not therefore necessary or indispensable parties. For the distinction we have in mind see Bank of California Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879.

The owners of the property were not necessary nor indispensable parties here. Their only interest would be their right to grant or refuse consent to the sub-lease to respondent. This right does not appear on the face of the pleadings. The major lease from the owners is not in the record. The sub-lease of Mrs. Feichtmeir to respondent is a part of the record. To this is attached the written consent of the owners. It is in this sub-lease that we find the option to respondent for a renewal of the sub-lease. The written consent of the owners approves the contract of the lessees without any restriction or qualification. From this fact the trial court could draw the inference that the owners approved the option. They may have been proper parties to this controversy to the extent of protecting their right to object to the sub-letting if such right had been reserved to them in the major lease. But it is patent that they were not indispensable parties because the trial court, invoking the provisions of section 389 Code of Civil Procedure could save those rights without their appearance as parties.

[7, 8] Furthermore, if the major lease contained restrictions against a sub-letting, it was a matter of defense to be shown by proof. Since that lease was in the possession of the appellants, their failure to produce it justified an inference that the evidence was unfavorable to them, hence that it did not require the owner's consent to a sub-lease. To recapitulate—if the owners were necessary or indispensable parties that fact did not appear on the complaint, and appellants failed to show it by proper proof.

[9] The argument is made that the complaint failed to state a cause of action because it did not plead false representations made to respondent, his reliance thereon, and his damage. This is not that kind of an action. The pleading of fraud was merely a detail in the statement of facts leading to the second lease. Fraud is not essential to the judgment and may be dismissed from consideration.

[10] The real issue in the case lies in the finding that Armin Feichtmeir was merely a dummy lessee, that the real lessee was Mrs. Feichtmeir and that the lease was taken in the name of Armin to defeat respondent's exercise of the option, and was held for the sole purpose of enabling Ralph Feichtmeir to occupy the entire premises for the barber shop and to use the profits in the support of his mother. The evidence fully supports these findings and

we should not quibble over fraud, misrepresentations, or trusteeship. The findings of fact support the conclusion that respondent was entitled to a renewal of his sub-lease, and that the three named defendants were acting in concert to defeat that right. The chancellor had full power to make his judgment effective, and we find no error in the record or in the judgment.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

95 Cal.App.2d 159

PATTY et al. v. BERRYMAN.

Civ. 14145.

District Court of Appeal, First District,
Division 1, California.
Dec. 19, 1949.

Hearing Denied Feb. 16, 1950.

Walter W. Patty sued Amy M. Berryman, as administratrix of the estate of E. R. Berryman, deceased, for the amount of a profit lost by plaintiff because of deceased's default in performance of a contract to purchase certain prefabricated houses from plaintiff. Defendant filed a cross-complaint against plaintiff and John S. Huston for an amount paid by deceased to plaintiff as cross-defendant Huston's alleged agent.

From a judgment of the Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., for plaintiff and cross-defendants, defendant and cross-complainant appealed.

The District Court of Appeal, Peters, P. J., affirmed the judgment, holding that deceased's contract to purchase the houses was not unenforceable as unilateral contract containing no promise of delivery by plaintiff, who impliedly promised to sell them by writing word "accepted" and signing his name on deceased's letter offering to buy them, and that plaintiff was entitled to recover the entire amount of his lost profit without credit to the estate for the amount paid by deceased.

1. Sales ⚷**32**

A contract to buy certain prefabricated houses was not unenforceable as unilateral contract containing no promise of delivery by seller, who wrote word "accepted," followed by his signature, on buyer's letter offering to purchase houses, and hence impliedly promised to sell them.

2. Contracts ⚷**168**

The obligation of party to contract need not be expressly stated therein, but may be inferred from other party's undertakings.

3. Sales ⚷**54**

Where one party to contract agrees to buy property from the other party and nothing is expressly said in contract as to such other party's obligation to sell, his obligation to do so may be implied.

4. Sales ⚷**54**

Doubt as to whether agreement to purchase prefabricated houses was bilateral or unilateral must be resolved by interpreting agreement as bilateral, thus protecting both parties, rather than unilateral, which would protect neither

5. Contracts ⚷**175(1)**

There is a presumption in favor of interpreting ambiguous agreement as bilateral rather than unilateral.

6. Contracts ⚷**10(4)**

Where performance of sale contract is optional with one of parties or quantity of goods involved rests in one party's sole discretion, no enforceable obligation of other party exists.

7. Executors and administrators ⚷**202(1)**

Where parties to contract for sale of prefabricated houses and one subsequently contracting to purchase them from original buyer knew, before and after date specified for such buyer's performance of original contract, that second buyer could not perform his contract, unless he sold houses, and original seller gave first buyer oral extensions of time to perform, thus enabling him to give like extensions to second buyer, both contracts were in force and effect on second buyer's death after such date, so that his default, whether on that date or at time of his death, entitled first buyer to recover from decedent's estate amount of first buyer's lost profit from resale.

8. Sales ⚷82(3)

While payment of purchase price and delivery of goods are concurrent conditions in ordinary purchase and sale agreement, such rule is not strictly applied where buyer knows that seller does not own goods involved when contract is executed.

9. Sales ⚷50

Where one contracting to purchase prefabricated houses knew soon after execution of contract that seller had contracted to purchase them from another, that seller endorsed buyer's partial payment checks to such other as payments on previous contract, and that seller had to get title from other party to such contract, but made no objection that seller did not have title to houses, buyer waived right to object by his silence.

10. Sales ⚷13, 81(1)

One contracting to sell goods which he does not own is allowed reasonable time after payment therefor by buyer to purchase them, but must have some interest therein and cannot commence to acquire goods for first time when buyer tenders purchase price.

11. Sales ⚷194

One failing to pay purchase price of prefabricated houses on date fixed for performance of his contract to purchase them was in default, though seller could not deliver houses without first paying person from whom seller had contracted to purchase them, as seller only had to pay such person to complete his title to houses. Civ.Code, § 1439.

12. Contracts ⚷313(2)

A threat, made by owner of prefabricated houses in conversation with attorney for one contracting to purchase them from person to whom owner had contracted to sell them, to sue client for breach of contract, unless he paid owner specified sum for release, did not constitute anticipatory breach of contract between client and original buyer, especially where parties did not treat threat as a breach.

13. Sales ⚷384(1)

The statute providing that measure of damages for buyer's breach of contract by wrongfully neglecting to accept and pay for goods sold is estimated loss directly and naturally resulting in ordinary course from such breach, or, if there is available market for goods, difference between contract price and market or current price, in absence of special circumstances showing proximate damage of greater amount, applies only where seller retains goods after buyer's default, and is inapplicable where seller is a middleman, whose profit depends on difference between his purchase and selling price. Civ.Code, § 1784, subds. 2, 3.

14. Sales ⚷384(1)

One contracting to sell prefabricated houses for specified price exceeding that for which he had contracted to purchase them from owner was entitled to recover entire amount of difference between such prices from deceased defaulting buyer's estate, without set-off of amount paid by buyer on purchase price and turned over by seller to owner under original contract, as damages for decedent's breach of contract, where decedent knew that his default would directly cause default by seller under his contract with owner and that seller expected to make profit on deal. Civ.Code, § 3300.

15. Sales ⚷384(1)

The administratrix of estate of decedent, who had defaulted in performance of contract to purchase prefabricated houses from one contracting to purchase them from owner, was not entitled to have sum paid by decedent on purchase price credited on amount of seller's judgment against estate for difference between his purchase and sale prices, where seller immediately turned over such sum to owner, as decedent knew that original contract required; expenditure of such sum being reasonably necessary to preserve rights of all concerned.

16. Damages ⚿45, 120(2)

Reasonably necessary expenditures incurred and value of services rendered by contracting party not in default may be recovered by him as damages for other party's breach of contract, where innocent party has not also recovered full price or value of benefits expected under contract, and he is also entitled to net profit he would have made on entire contract, which profit is contract price, less total expenditures, including those already incurred, from beginning to end of contract.

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Rogers & Clark, Bruce F. Allen, San Francisco, for appellant.

Bruce M. Parks, San Francisco, for respondent Walter W. Patty.

Fitzgerald, Abbott & Beardsley, Oakland, for respondent John S. Huston.

PETERS, Presiding Justice.

The administratrix of the estate of E. R. Berryman appeals from a judgment awarding plaintiff, Walter W. Patty, $10,000 for breach of contract, and denying the estate's right to any judgment against Patty and the other cross-defendant, John S. Huston.

The facts are as follows: On, prior, and after November 1, 1946, Huston was the owner of 22 prefabricated houses. On the morning of that day, Patty entered into a contract with Huston whereby Patty agreed to buy, and Huston impliedly agreed to sell, the 22 prefabricated houses for a total purchase price of $53,750, payable $1,000 on November 1st, $4,000 on November 6th, and the balance by December 6, 1946. Patty and his partner Kelly, as Huston well knew, were sales promoters and intended to resell the houses at a profit. Prior to the Huston-Patty contract, Patty had had some oral negotiations with Berryman, so that, when the Huston-Patty contract was signed, Patty knew that he had a purchaser for the houses in the person of Berryman. In fact, a contract between Patty and Berryman in the form of a letter to Patty signed by Berryman and marked "accepted" by Patty was executed on the afternoon of November 1, 1946. Except as to the purchase price, which was $63,800, and for the final date of performance, which was fixed as December 5, 1946, this agreement was in the same form as the Huston-Patty agreement. On November 1, 1946, Berryman paid by check the sum of $1,000 to Patty, pursuant to the terms of the contract, and Patty endorsed the check over to Huston, pursuant to the terms of the Huston-Patty agreement. When these agreements were executed, Huston did not know of the identity of the purchaser to whom Patty intended to resell the houses, and Berryman did not know Huston. These two parties became acquainted by November 7, 1946, and each then knew of the other's relationship to the transaction. On November 7th, Huston and Patty signed an addendum to their contract extending the time of final payment from December 6, 1946, to January 6, 1947, and on the same date Patty and Berryman signed an addendum to their contract extending the final date of payment from December 5, 1946, to January 5, 1947. When this addendum was signed by Berryman he paid to Patty by check $4,000, which check Patty immediately endorsed over to Huston. All parties involved knew of these transactions.

Berryman intended to resell the houses, and, with the assistance of Patty and Kelly, on November 27, 1946, he entered into a contract with the American Bulb Growers and A. G. Adams to sell the houses to them for $85,800, of which $1,000 was paid to Berryman, the balance being payable June 1, 1947. This contract was terminated by mutual consent of the parties on January 28, 1947.

None of the contracts was ever completed. During November and December, 1946, and up until he died in March of 1947, Berryman was heavily involved financially in other transactions and was just unable to raise any money. Patty and Kelly tried to aid Berryman in finding a purchaser for the houses, and were partially responsible for the Berryman-Adams contract.

Under the terms of the Huston-Patty contract, performance was due by Patty on January 6, 1947, while under the terms of the Patty-Berryman contract, the latter was required to pay the full purchase price to Patty on January 5, 1947. Because of Berryman's default, Patty defaulted in his payments to Huston. Thus the contracts normally would have terminated no later than January 6th. The evidence is not entirely clear as to what happened thereafter, but the most reasonable interpretation of what then occurred is that Huston and Patty both realized that if Berryman could sell the houses they would get their money, and they were loathe to terminate Berryman's rights without giving him a full and fair opportunity to perform. There is substantial evidence to the effect that after January 6th, Huston orally gave several extensions on the time limit for performance, which extensions applied to both Patty and Berryman. After the termination of the Berryman-Adams contract, Patty and Kelly tried to find another purchaser for Berryman and did get several offers, but none higher than $40,000. Berryman died on March 19, 1947, and later in that year Huston succeeded in selling the houses to other individuals for some undisclosed amount.

It is clear that, if the deals had gone through, Huston would have received $53,750 for the houses, and Patty would have received $63,800 for them. Thus, Patty would have realized a profit of $10,050. Huston did get $5,000 and he kept the houses, while Patty lost his $10,050 profit. Patty filed a claim against the estate of Berryman for $10,000, and, upon its rejection, brought this action against the estate of Berryman for the $10,000. The estate answered and cross-complained for the $5,000 paid by Berryman to Patty, naming Patty and Huston as cross-defendants, it being the theory of the cross-complaint that Patty was the agent for Huston.

The trial court found that Patty at no time was acting as the agent of Huston; that Patty was relying on Berryman to perform his contract so that Patty could make good on his contract with Huston; that Berryman was aware of the Huston-Patty contract, and knew that Patty did not have sufficient capital to buy the houses himself; that Patty at all times was ready and able to deliver possession and tendered delivery; that Berryman received adequate consideration under the terms of the contract; that Berryman defaulted, and such default prevented Patty from completing his contract with Huston.

The court concluded that the Patty-Berryman agreement constituted a valid bilateral contract, and that Patty had been damaged to the extent of $10,000, his loss of profit. The court refused any relief on the cross-complaint, and refused to allow any credit on the $10,000 awarded Patty because of the $5,000 payment.

[1-3] The first major contention of appellant is that the agreement is unenforceable because it contains no promise of delivery on the part of Patty. Appellant seriously urges that the letter amounted to an offer of a unilateral contract which could be accepted only by the act of delivery. A reading of the document demonstrates the error in appellant's position. It reads, in part, as follows:

"San Francisco, California
"November 1, 1946

"Mr. Walter W. Patty
"4103 24th Street
"San Francisco, California

"Re: Purchase of 22 Williamson Prefabricated Houses.

"Dear Mr. Patty:

"I hereby agree to purchase from you twenty-two (22) Williamson Prefabricated Houses hereinafter described, for a total price of $63,800.00, payable $1,000.00 upon delivery of this letter to you, $4,000.00 on or before 12 o'clock noon, November 6, 1946, and the balance at 4103 24th Street, San Francisco, California, on or before 12 o'clock noon on the 5th day of December, 1946, the balance of the purchase price to bear interest at the rate of five percent (5%) per annum after its due date.

"The houses are now in the possession of Western Auto Supply Company, and are of two types, consisting of twenty (20) Williamson 5-room cottage plan No. 400 houses, and two (2) Williamson 5-room cottage plan No. 500 houses.

"Attached hereto and made a part hereof are plans and material lists for the houses above mentioned.

"It is understood and agreed that there is no window glass or roofing material in said material lists, and no flooring for the two Model 500 houses, and it is further understood and agreed that you are not to furnish these materials.

"I agree to take all houses in their present condition, but you are to reimburse me for the reasonable value of any items that may be missing on delivery to me.

"The title to the houses purchased by me under the terms of this agreement shall pass upon their delivery to me at their present storage location and the payment by me of the full balance of their purchase price. All costs of handling, sorting and loading houses on trucks in connection with their delivery shall be paid by me.

"All houses are to be warehoused at my expense after the 1st of November, 1946, and I hereby agree to pay all public warehouse charges accruing thereafter and to pay you for any of these units stored by you a reasonable storage charge of not in excess of $10 per unit per month. * * *

"I shall be entitled to take delivery of units in the order and number that I request only after having paid the full purchase price as aforesaid.

"You shall incur no liability hereunder to me for inability to deliver or for any delay in the delivery of said houses occasioned by governmental action, fires, floods, strikes, labor difficulties, accidents, acts of God or any other similar or different contingencies beyond your control.

"In the event that I fail to complete the payment of the purchase price of these houses within the time aforesaid, you may retain any moneys heretofore paid on the purchase price of said houses as consideration for the execution of the agreement on your part, and as consideration for withholding the houses from sale during the period from the date hereof until the time I have agreed to pay the unpaid balance of the purchase price of said houses.

"I understand that the said houses as described in the plans and material lists are sold as is and where is and without warranty, express or implied, except warranty of title.

"I agree to pay at the time of paying the balance of the purchase price, any and all sales or use taxes attaching to the sale of said houses from yourself to myself.

"Any notice that you desire or may be required to give or make upon me shall be in writing either delivered personally or sent to me * * *

"If it becomes necessary for you to make any tender to me, the tender may be made in the manner aforesaid and without physically producing or tendering the houses.

"The foregoing, when accepted by you, shall constitute the entire agreement between us.

"If the foregoing is satisfactory to you, please sign and return to me the enclosed duplicate original hereof.

"Very truly yours,
"[Signed] E. R. Berryman
"E. R. Berryman

"Accepted, and the sum of
$1,000.00 received, November 1, 1946.
"[Signed] Walter W. Patty
"Walter W. Patty"

Addendum to Contract.

"1—Paragraph 1 to be modified to read 'and the balance at 4103 24th Street, San Francisco, California, on or before 12 o'clock noon on the 5th day of January 1947, the balance of the purchase price to bear interest at the rate of 5% per annum after its due date,' with the expressed agreement that we will take a minimum of at least three (3) houses to be purchased and paid for within a period of thirty (30) days.

"2—You will hereby waive lien rights of all houses purchased and paid for from you.

"[Signed] E. R. Berryman
"E. R. Berryman
"[Signed] Walter W. Patty
"Walter W. Patty"

It is true that in the above document Berryman made all of the express promises, and that Patty made no express promise. But a promise to sell on the part of Patty is necessarily implied. The letter identifies the property to be purchased, fixes the purchase price and sets forth the terms of the proposed transaction in minute detail. Patty wrote "accepted" on the letter, and signed his name. What else could the term "accepted" mean except that he agreed to the terms set forth, and necessarily agreed to sell on those terms? If authority is necessary to establish such an obvious conclusion, it can be found in the cases of Gregg v. McDonald, 73 Cal.App. 748, 239 P. 373, and Herrlein v. Tocchini, 128 Cal. App. 612, 18 P.2d 73. In the first of these cases, 73 Cal.App. at page 754, 239 P. at page 375 the Court stated: "It is uniformly held that the obligation of a party need not be expressly stated in the contract, but may be inferred from the undertakings of the other party. Thus it has been held that where one party agrees to buy from the other, and nothing is expressly said as to the obligation of the latter to sell, such obligation to sell may be implied. Thomas-Huycke-Martin Co. v. Gray, 94 Ark. 9, 125 S.W. 659, 140 Am.St.Rep. 93."

In the second case above cited, 128 Cal. App. at page 620, 18 P.2d at page 76 the Court stated: "It cannot be denied that the escrow agreement was clumsily drawn and that paragraph three thereof lends color to appellants' claim with respect to an option. Then, too, there is no explicit promise on the part of respondent Herrlein to sell, or on the part of appellant Tocchini to buy. * * * However, it seems not to be so lame with respect to the mutual obligations of the parties as appellants profess to believe. The parties are designated as buyer and seller, the price is named and the property identified. In these circumstances it may be implied that Herrlein agreed to sell and that Tocchini agreed to buy."

[4, 5] If doubt existed as to whether the agreement was bilateral or unilateral, such doubt would have to be resolved by interpreting the agreement to be bilateral, thus protecting both parties, rather than unilateral, which would protect neither. There is a presumption in favor of interpreting ambiguous agreements to be bilateral rather than unilateral. Davis v. Jacoby, 1 Cal.2d 370, 379, 34 P.2d 1026; Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Restatement of Contracts, § 31; 1 Williston on Contracts, § 60.

[6] The cases cited by appellant on this issue—California Refining Co. v. Producers Refining Corp., 25 Cal.App.2d 104, 76 P.2d 553; and Foley v. Euless, 214 Cal. 506, 6 P.2d 956—are not in point. Neither case involved the question here presented. In both cases, the quantity involved depended upon the whim or caprice of one of the contracting parties. In each case there was an illusory promise—that is, no promise at all. It is elementary, of course, that where performance is optional with one of the parties, or where the quantity involved rests in the sole discretion of one of the parties, no enforceable obligation exists. In the instant case, unlike the two cited cases, the quantity involved—22 designated houses—was clearly fixed, and the price and terms of sale were set forth in minute detail. None of the promises here involved was illusory. Woodbine v. Van Horn, 29 Cal.2d 95, 105, 173 P.2d 17.

[7] Both parties discuss at some length the question as to whether or not the record shows Berryman received valid oral extensions of the time of performance under his contract after January 6, 1947. It is the theory of the appellant that the record shows that Berryman received extensions up to the time of his death on March 19, 1947, but that the Huston-Patty contract terminated January 6, 1947. Hence, it is argued that Patty could not perform after January 6th, and could not thereafter place Berryman in default. The evidence in reference to these oral extensions is quite confusing. Huston testified in his deposition that Patty was in default after January 6, 1947, but he also stated that Patty was given oral extensions after that time. Patty's testimony is likewise ambiguous. He first testified that his interest in the houses terminated on January 6th, but he also testified that after that date he offered to deliver the houses to Berryman, and that Huston agreed with Berryman and Patty that, if Berryman could sell one or more of the houses, he, Huston, would "credit Mr. Berryman with that towards the contract, up until Mr.

Berryman's death." Patty also testified that Huston gave oral extensions directly to Berryman after January 6th, and that such extensions applied to him also. While the testimony on this issue is certainly ambiguous, a reading of the record leads to the conclusion that Huston, Patty and Berryman, before and after January 6th, knew that Berryman could not perform unless he sold the houses, and all three cooperated to accomplish this purpose. Neither Huston nor Patty was desirous of terminating the contract on January 6th, and were desirous of giving Berryman every reasonable opportunity to perform. To this end, Huston gave Patty oral extensions, thus enabling Patty to give extensions to Berryman. Undoubtedly, these extensions were not given in any formal way. Huston was anxious to get rid of the houses and frequently talked with both Patty and Berryman, and these extensions were usually granted during these conversations. Thus, both contracts were in force and effect on the death of Berryman and at that time there was a default under the Patty-Berryman contract.

The appellant finds herself on the horns of a dilemma so far as this point is concerned. If there were valid extensions, such extensions applied to both contracts. On the other hand, if there were no valid extensions, the default occurred January 6, 1947, and Patty was then damaged to the extent of $10,050—his anticipated profit. Berryman's then default caused Patty to lose his interest in the houses under the Huston-Patty contract. In either event, Berryman defaulted. Whether that default took place in January or occurred in March is immaterial. In either event, the measure of damages would be the same.

Appellant next contends that delivery of the houses and payment of the purchase price were concurrent conditions and that, since at no time could Patty have delivered the houses had Berryman paid him the purchase price, because Patty would first have to pay Huston, Berryman was never in default. Appellant contends that § 1439 of the Civil Code compels such a holding. That section provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party * * *."

[8, 9] While it is true that, in the ordinary purchase and sale agreement, payment of the purchase price and delivery of the goods are concurrent conditions, that rule is not strictly applied where the buyer knows the seller does not own the goods involved when the contract is executed. The trial court found, and the finding is supported, that Berryman knew of the Huston-Patty contract as early as November 7, 1946. It is also a found fact, supported by the evidence, that Berryman knew that Patty endorsed the checks given to him by Berryman over to Huston as payments on the Huston-Patty contract. Berryman knew that Patty had to get title from Huston, and Patty could have done this in a very few moments. Berryman made no objection at any time that Patty did not have title to the houses. By his silence he waived any right to object.

[10, 11] Where a seller contracts to sell property he does not own the law applies a common sense rule that a seller is allowed a reasonable time after payment by the buyer during which he can purchase the goods required to meet his promise. Darr v. Clevelin Realty Corp., 33 Cal.App.2d 500, 504, 92 P.2d 475; Ellwood v. Niedermeyer, 12 Cal.App.2d 699, 704, 56 P.2d 279; Restatement of Contracts, § 269. In such cases the seller probably must have some interest in the goods. He cannot, when the buyer tenders the purchase price, then, for the first time, commence to acquire the property. But here Patty had the houses tied up in his contract with Huston, and simply had to pay Huston to complete his title. See, 25 Cal.Jur. p. 495, § 25.

The appellant cites Brant v. Bigler, 92 Cal.App.2d 730, 208 P.2d 47. That was an action for declaratory relief brought by the seller on an agreement involving the sale of real property. The facts are similar to those here, in that the seller did not have title to the land sold, but was relying upon the use of the buyer's money in order to be able to purchase the property. Each of the transactions in which the seller was involved was in the form of an escrow. He gave instructions to the Santa Monica escrow company, which was the depository of defendant buyer's funds, to transfer the money to a company in Glendale through which he was purchasing the property. The seller was denied relief, the court stating that the buyer had not consented to the simultaneous escrow device, and therefore the Santa Monica escrow company could not lawfully have made the transfer. The only way that defendant buyer could have been placed in default was for the seller to have placed the deed in the Santa Monica escrow. The case is clearly distinguishable from the instant one. Obviously, the Santa Monica escrow company could not have complied with the seller's instructions to transfer the money to the Glendale company without breaching its fiduciary duty owed to the purchaser. Moreover, as the court pointed out, the case involved an attempted forfeiture, and so, of course, the court tended to that view which would avoid the forfeiture.

[12] One of the attorneys for appellant testified that Huston telephoned him on December 28, 1946, and demanded to know if Berryman was going to perform his agreement with Patty. The attorney stated that he told Huston that Berryman was in no financial position to perform. Thereupon, Huston threatened suit, and threatened that, unless Berryman paid him $10,000 for a release, he would sue. Appellant seeks to make much of this incident, claiming that this was a repudiation—an anticipatory breach—of the contract by Berryman, and demonstrates that the Patty-Berryman contract was not extended. In view of the evidence heretofore set forth of the conversations between Berryman, Patty and Huston, it is obvious that the parties did not treat this as a breach. If any breach occurred, it was waived. Moreover, the conversation was with Huston, not with Patty. Just how a conversation with Huston, with whom Berryman had no contractual relations, could constitute an anticipatory breach of the contract between Berryman and Patty, does not appear. Section 318 of the Restatement of Contracts, in Illustration No. 3, gives the following example: "A and B enter into a bilateral contract to sell and buy goods during the following month. Before the time for performance arrives, A tells C, a third person having no right under the contract, that he intends not to carry out his contract with B. C informs B of this conversation, though not requested by A to do so. A has not committed an anticipatory breach."

[13, 14] The last major point urged by appellant is that the trial court applied the wrong measure of damage, and erroneously refused to allow appellant a $5,000 set off. On the issue of damages the trial court found that: "It is further a fact that at all times herein mentioned from and after November 7, 1946, decedent knew that default by him under, and failure on his part to pay and perform under, his agreement with plaintiff, Exhibit 'A' to the complaint would directly cause a default on plaintiff's part under plaintiff's contract as buyer, with John S. Huston, as seller, since decedent knew, as the fact was, that such default on decedent's part when coupled with the prompt necessity on plaintiff's part of making payment to John S. Huston under plaintiff's contract, as buyer, with Huston, as seller, would not afford plaintiff sufficient time either to procure the necessary funds to make payment on his contract with Huston or permit plaintiff sufficient time to effect a further sale of said houses, or any thereof, to any third person, since plaintiff believed and knew on or about January 5, 1946, and for some time prior and subsequent thereto that there was no immediately available or ready market for the sale of said * * * houses but instead plaintiff knew, as the fact was, that said * * * houses could only be sold at or about said times for a price in excess of $40,000 or $50,000 as the chance result of happening to find a person, * * * who had a particular need or desire therefor at the time."

This finding clearly applied the correct measure of damages. The general rule is that for breach of contract, the injured party is entitled to damages in such amount as "will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." § 3300, Civ.Code. Berryman obviously knew that Patty expected to make a profit on the deal. The loss of that profit was proximately caused by Berryman's failure to perform. Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App.2d 265, 267, 61 P.2d 944. Section 1784 of the Civil Code is the section providing the measure of damages where the buyer wrongfully neglects to accept and pay for goods. Subd. 2 provides that: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract." Subd. 3 provides that where there "is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price". This section obviously applies where the seller has the goods and retains them after the default. But it has no application to a situation where the seller is a middleman and everyone knows his profit depends upon the difference in his purchase and selling price. Therefore, there are "special circumstances" here present that make market value a false factor. Moreover, the trial court found, and the finding is supported, that during the times here involved there was no ready or available market for the houses.

Contrary to appellant's argument, the market value of these houses at any time is an immaterial factor. The damages to Patty had no relation to market value and were totally unaffected by such value. Whether the market value of the houses was $40,000 or $100,000 would not affect his damage. In either event, his loss was the difference between his contracted for purchase price—$53,750—and his contracted for sales price of $63,800, or $10,050.

The case of Rice v. Schmid, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589, relied upon by appellant, is not in point. That case held that, under § 1784 of the Civil Code, the proper measure of damages was the difference between the market and contract prices in a case where the plaintiff contracted to buy flour and at the same time contracted to sell flour to the defendant who subsequently failed to perform. That case dealt with a brand name flour, and the contract provided that the seller should procure the "flour of the specified brands, whether from the miller or on the market". 18 Cal.2d at page 388, 115 P.2d at page 501. In the instant case, the houses were a definite product not available on the general market. Moreover, unlike the flour case, in the instant one the court found that there was no market available for the houses.

[15, 16] Appellant contends that, in any event, she is entitled to a credit on the $10,000 judgment for the $5,000 already paid Patty, on the theory that a buyer in default should be credited for payments on the purchase price already made to and retained by the seller. Gopcevic v. California Packing Corp., 64 Cal.App. 132, 141, 220 P. 1078. That principle has no application here. The $5,000 paid by Berryman to Patty was immediately turned over by Patty to Huston in order that Patty could perform under the Patty-Berryman contract, and Berryman knew that the money was to be so used. The expenditure of the $5,000 was reasonably necessary in order to preserve the rights of all concerned. The proper rule of law is thus expressed by McCormick in his Handbook on the Law of Damages, p. 582, as follows: "Reasonably necessary expenditures incurred, and the value of services rendered, by the contracting party not in default, may be recovered as damages for breach of contract, wherever the plaintiff has not also recovered the full price or the value of the benefits expected under the contract. * * * In addition to expenses, the plaintiff is entitled to the net profit he would have made upon the entire contract, if he can establish it. The net profit is the contract price less the total amount of expenditures, including those already incurred

which the plaintiff would have made from the beginning to the end of the contract."

Patty is entitled to be made whole. Had Berryman performed, Patty would have had $10,050 (reduced by the claim filed with the estate to $10,000) net. If Berryman is credited with the $5,000, obviously Patty will only have $5,000 of his expected $10,000 profit. Actually, the court allowed a credit to Berryman's estate. Properly computed, the damages are as follows:

Patty's loss of expected profit due to breach	$10,000
Patty's necessary expenditures to enable him to perform on the Berryman contract	5,000
Total damage	$15,000
Credit to Berryman's estate for payments	5,000
Total damage	$10,000

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

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95 Cal.App.2d 82

SIME v. MALOUF et al.

Civ. 16847.

District Court of Appeal, Second District, Division 3, California.

Dec. 14, 1949.

As Amended on Denial of Rehearing Jan. 13, 1950.

See 213 P.2d 788.

Harry R. Sime brought action against A. B. Malouf and others to recover damages for fraud and for conspiracy to defraud plaintiff of his interest in project as joint adventurer to acquire bonds.

The Superior Court of Los Angeles County, W. Turney Fox, J., rendered a judgment for the plaintiff, and the defendants appealed.

The District Court of Appeal, Shinn, P. J., affirmed the judgment and held that evidence sustained finding of fraud on part of defendants.

1. Corporations 🔑432(4)

Seal of corporation on written agreement was presumptive evidence of due execution. Corporation Code, § 833.

2. Joint adventures 🔑1.15

In action for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, evidence sustained finding that contract of plaintiff with corporation for joint adventure was duly executed.

3. Fraud 🔑16

Where defendants, joint adventurers with plaintiff in the purchase of bonds and acquisition of realty through use of bonds, acting in concert, maintained litigation to depress marketability of bonds, concealed from plaintiff that they owned a controlling interest in corporation which was a party to joint adventure with plaintiff, produced dummy purchaser to acquire plaintiff's interest, and concealed fact that they were both buyers and sellers, and plaintiff parted with interest at price far below its real value, defendants were guilty of actionable fraud rendering them responsible in damages for amount of loss.

4. Joint adventures 🔑1.1

A "joint adventure" is a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Joint Adventure".

5. Joint adventures 🔑1.8, 4(1)

Joint adventurer does not have authority to bind the other joint adventurers, and they have an equal right to control the management of the enterprise, but they may by agreement grant authority to one or more of their number which would not be implied from the relationship alone.

6. Joint adventures 🔑1.15

In action for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, evidence was sufficient to establish that plaintiff was a joint adventurer with corporation and defendants as stockholders of corporation.

7. Corporations 🔑215

Stockholders who had complete control over corporation which had entered into a joint adventure with individual to acquire bonds, had duty to see that corporation fulfilled its obligations to individual as a joint adventurer, and were responsible for corporation's breach of duty.

8. Conspiracy 🔑19
Fraud 🔑58(1)

In action for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, evidence sustained finding that fiduciary relationship between plaintiff and defendants as stockholders and officers in control of corporation had not been terminated at time of alleged fraud.

9. Joint adventures 🔑4(1)

Joint adventurers are, as a matter of law, fiduciaries.

10. Joint adventures 🔑4(1)

Fact that persons engaged in a joint venture may quarrel or be at odds over the business in which they are associated, or may even be involved in litigation with one another, does not, as a matter of law, relieve them of their fiduciary duties.

11. Joint adventures 🔑1.14, 4(1)

Though dissension between joint adventurers may provide a sufficient ground for dissolution of venture by a court of equity, in absence of such a decree, an agreement fixing time of termination, or a voluntary abandonment of enterprise by one of the parties, agreement remains in force until its purpose has been accomplished or has become impossible of fulfillment, and, while it is in force, ordinarily one joint adventurer has no right to exclude another, or to withdraw himself from the arrangement, in order to act independently in respect to the subject matter.

12. Joint adventures 🔑4(1)

Compliance with fiduciary duties is exacted as a matter of law from parties to a joint adventure, and a fiduciary status may exist as a matter of fact where it would not otherwise be inferred from the mere relationship of the parties.

13. Joint adventures 🔑1.14
Trusts 🔑102(1)

One who voluntarily assumes a position of trust and confidence is a fiduciary, and he remains a fiduciary as long as trust and confidence are reposed in him, and such status may continue in fact in case of joint adventurers after dissolution of their association, though dissolution would normally end the fiduciary status. Civ.Code, § 2219.

14. Fraud 🔑16

The gist of an action for "fraud" is fraudulently producing a false impression on the mind of the other party, and, if such result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Fraud".

15. Fraud 🔑4

Though fact that one sells or purchases property secretly through an agent does not give rise to an inference of fraudulent intent, such an inference may be warranted by special accompanying circumstances.

16. Fraud 🔑11(1)

An intentionally false affirmation of opinion or belief, being a misrepresentation of the state of mind of the speaker, is actionable where the speaker has superior knowledge or special information concerning the subject matter of the representation.

17. Statutes 🔑225.1

Statute of limitation requiring a fraud action to be brought within three years after discovery of the fraud, is to be read in connection with statute providing that every person who has actual notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned of such fact. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

18. Appeal and error ⚿1011(1)

Issue whether plaintiff in fraud action had notice of facts sufficient to put a prudent man on inquiry, so as to start running of three-year limitation statute, and, if so, whether an inquiry reasonably conducted, would have disclosed to him the true state of affairs, was a question of fact for the trial court, and finding that plaintiff had no such notice, if based on conflicting evidence or reasonable inferences from the evidence, could not be disturbed. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

19. Limitation of actions ⚿195(3)

In action for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, burden was on defendants to establish that the action was barred by three year limitations. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

20. Limitation of actions ⚿100(13)

The rule of constructive notice which will start running of three year limitation statute with respect to cause of action for fraud demands that there must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former furnish a reasonable and natural clue to the latter, and circumstances that are dubious or equivocal are not sufficient to take the place of actual notice. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

21. Limitation of actions ⚿100(13)

The rule of "constructive notice" which will start running of three year limitation statute with respect to cause of action for fraud imputes notice only of those facts that are naturally and reasonably connected with the facts known, and of which the known facts can be said to furnish a clue, and does not impute notice of every conceivable fact, however remote, which might come to light by exhausting all possible means of knowledge. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Constructive Notice".

22. Limitation of actions ⚿100(13)

In order to give rise to constructive notice which will start running of three year limitation statute with respect to a cause of action for fraud, circumstances must be such that further inquiry is not merely suggested, but becomes an imperative duty, and failure to make it constitutes a negligent omission. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

23. Limitation of actions ⚿197(2)

In action for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, evidence sustained finding that action was not barred by three year limitation statute on ground that plaintiff was in possession of facts sufficient to put him on inquiry more than three years prior to institution of action. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

24. Limitation of actions ⚿100(13)

In order that one who claims to have been defrauded, be charged with constructive knowledge of facts constituting the fraud so as to start running of three year limitation statute, it must appear not only that he had notice of facts sufficient to put a prudent person on inquiry, but also that means for the discovery of the facts were available to him. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

25. Limitation of actions ⚿100(13)

One who has acted in a manner which would reasonably induce another to forego or discontinue an investigation of fraudulent acts, cannot say, in support of his defense that cause of actions for fraud has been barred by three year limitation statute on ground of notice of the fraud, that facts would have been developed had inquiry been made. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

26. Release ⚷25

Release would be construed most strongly against those who prepared it.

27. Release ⚷56

If release should be deemed ambiguous as to intention of parties respecting possible coverage, court could properly have considered any testimony of the parties bearing on their intentions and understandings.

28. Release ⚷17(1), 23

If it was intention of defendants to obtain release from consequences of frauds they were committing on plaintiff and of which plaintiff was ignorant, and if they incorporated into the release language designed to accomplish that purpose, that, in itself, would have constituted a fraud on plaintiff, rendering the release void and rescission unnecessary.

29. Release ⚷33

Where release related only to claims having origin in joint venture between plaintiffs and corporation to acquire bonds, and came into existence only on completion of purchase by defendants of plaintiff's interest, release was not a bar to plaintiff's action. Civ.Code, § 1542.

30. Release ⚷24(2)

A restoration of consideration received for a release is not necessary, in order to avoid the bar of the release, where there is no question as to the right of the plaintiff, arising independently of the release itself, to retain what he received.

31. Release ⚷24

The law does not require, as the price of attack on a fraudulently induced release, sacrifice of independent rights, or the doing of idle acts.

32. Release ⚷24(2)

Where release did not cover claim in suit for damages for fraud, plaintiff received no consideration for his release other than releases received in his favor, and restoration of consideration paid plaintiff for property was not required through any considerations of equity or justice, so long as plaintiff affirmed contract and allowed defendants to keep plaintiff's property, and sought only recovery of damages, no restoration of consideration received by plaintiff, or any part of it was required.

33. Judgment ⚷576(3)

Where dismissal of cross complaint was obtained fraudulently, the dismissal was not a bar to subsequent action for fraud.

34. Fraud ⚷30

Where defendants against whom judgment was rendered in fraud action, were found liable not in misrepresenting value of bonds which plaintiff was induced to sell, but in creating a false set of circumstances which induced plaintiff to believe that it was best for him to sell at debased price, fact that a defendant in favor of whose personal representative a nonsuit was granted, was found to have acted without knowledge of the fraud did not exculpate the defendants against whom judgment was rendered.

35. Fraud ⚷39

Where it was not essential under facts that release be rescinded before institution of fraud action, those who signed release in addition to plaintiff were not necessary parties to the action.

36. Fraud ⚷67

Where joint adventure ended when plaintiff sold out to defendants, and neither party to joint adventure retained a right to an accounting by the other, damages were properly awarded plaintiff in fraud action without decreeing dissolution of the joint adventure and without directing an accounting.

◆

Jennings & Belcher; Morris Lavine, Los Angeles, for appellants.

E. C. Pyle; George Acret, Los Angeles for respondents.

SHINN, Presiding Justice.

This is an appeal by defendants A. B. Malouf, W. B. Malouf, B. B. Malouf, Bertrand L. Ball, Sperry Lawson, Ben Mar Hills Corporation and Ben Mar Hills Apartments, Inc. from a judgment against them in the amount of some $77,-

000 for fraud and conspiracy to defraud. The complaint originally named various other defendants among whom were five individuals who were directors of Edgerton, Riley and Walter, a dissolved corporation, at the time of its dissolution, Paul T. Sunday and Zack J. Farmer. Sunday died during the pendency of the action and a nonsuit was granted in favor of his personal representative who had been substituted as a party defendant. The court rendered judgment in favor of defendant Farmer and the above mentioned directors. Except as otherwise indicated, the word "defendants" will be used herein to refer collectively to the Maloufs, Ball, and Lawson.

Edgerton, Riley and Walter (herein referred to as E. R. & W.) was a corporation, now dissolved, which in 1937 was engaged in bond and stock brokerage business in Los Angeles. There were only nine shareholders all of whom, with the exception of Mr. Cecil B. DeMille, who was the majority stockholder, took an active part in the company affairs. Mr. DeMille's interests were represented through Mr. Treacy. Plaintiff, Harry Sime, had been employed by E. R. & W. prior to 1937 as a salesman of securities. In 1937 plaintiff and E. R. & W. entered into an agreement evidenced by a letter under date of November 18, 1937, signed by J. E. Edgerton as President, and J. D. Flora as Assistant Secretary of E. R. & W., bearing the corporate seal, which letter was endorsed "accepted" by plaintiff. The court found this agreement had been duly executed and also that it had later been ratified by E. R. & W. The material portions of the letter read as follows: "This is to confirm our agreement relative to bonds acquired by the undersigned company in the City of Burbank in the district commonly known as Ben Mar Hills. We agree to furnish necessary capital for the purchase of any outstanding bonds or property in said section of said city and provide any and all necessary working capital to effect a liquidation of our bond holdings in said city either by acquisition and sales of properties or any other legal means to result in disposing or liquidating our bond holdings at a profit. You are to represent us in dealings with other bondholders and in our dealings with the City of Burbank, all contracts or agreements, however, in which we shall become a party are subject to our approval before the same may become effective. These bonds and the liquidation as contemplated shall be on a joint basis between us, all specific and out-of-pocket expenses to be charged to the joint account of yourself and ourselves, profits and/or losses to be divided equally between us, the profits to be distributed at such dates as are mutually agreed upon between us. It is understood, however, that all costs and expenses incident hereto advanced by us pursuant to this agreement are to be deducted before any distribution of profits is made to either of us. It is further agreed that you may at your option at any time acquire one-half of the bonds held by us against property in said section of said City of Burbank by paying to us our costs thereof plus one-half of the expenses herein advanced by us." Evidence was presented at the trial tending to prove that the purported contract was not actually executed until more than a year after its date; however, there was other evidence that the instrument did truly reflect the oral agreement under which the parties had been operating since 1937. Pursuant to the agreement Sime and his associate, Tad Travers, engaged in continuous and successful efforts to acquire certain delinquent improvement bonds of the City of Burbank from the bond owners; negotiated for and secured execution of a contract with the City of Burbank under which the bonds could be used to bid upon and thereby acquire various delinquent parcels of real property in the Ben Mar Hills section; and obtained a release of certain tax liens, penalties and interest charges against the property on account of the delinquent street assessments. Sime also performed various other substantial services for the furtherance of the project which need not be recounted in detail.

On February 1, 1939, an action was filed by one William E. Smith, a resident of the City of Burbank, to enjoin the performance of the terms of the contract between the city and E. R. & W. Smith had no interest in the action and it was in fact instigated by one B. W. Marks, who later became associated with the Maloufs and

Lawson in the enterprise. The litigation was thereafter financed by the Maloufs and Lawson. In July 1939 the Maloufs and Lawson formed a copartnership which later became the corporate defendants. In November 1939 Ball, acting as an agent of the Maloufs and Lawson, purchased from Mr. DeMille, and held in his name for his principals, control of E. R. & W. Shortly thereafter Ball, representing that he was the owner of the majority shares, caused E. R. & W. to be reorganized with himself as President and a director and Lawson and one R. E. McGinnis, as additional directors. Ball also informed Sime that he would not recognize Sime's contract with E. R. & W. and told Sime he was discharged. On December 29, 1939, Ball obtained from the Board of Directors of E. R. & W. a resolution authorizing him to sell on or before 5 p. m. January 8, 1940, the corporation's interest in the Burbank project for $50,000 or more, and providing further that Ball should be paid a 5 per cent commission if a sale was consummated. On January 8th Ball reported to the Board that he had closed a sale with Zack J. Farmer whose cashier's check he held in the sum of $50,000. Unbeknown to Sime, Farmer was an agent of the Maloufs and Lawson in whose behalf he was making the purchase.

On January 12, 1940, Paul T. Sunday, who had acquired and owned a 50 per cent interest in the Burbank project together with E. R. & W. and Sime, commenced an action entitled Sunday v. Edgerton, Riley and Walter et al., to enjoin the sale on the ground that E. R. & W. had no right to sell without his consent. Sime, who had been named as a defendant in the Sunday action, filed a cross-complaint to enjoin the sale as being invalid as to his interest. Shortly after the filing of the cross-complaint Ball attempted to induce Sime to sell out his interest for $7,000 but Sime refused. This offer was later repeated and although Sime again refused he agreed to permit Sunday, who was trying to sell his own interest, to carry on negotiations in an effort to settle the entire matter. About February 13, 1940, Sunday told Sime that Farmer would pay $12,500 for Sime's interest in the payment and E. R. & W. would cancel Sime's indebtedness to it amounting to about $3,100. Sime accepted the offer. Pursuant to his agreement with Sunday, Sime and Travers and their respective wives executed a release of all claims against E. R. & W., Sunday and Ball; executed instruments of transfer; and Sime dismissed with prejudice his cross-complaint. Sunday and E. R. & W. executed an identical release in favor of Sime and Travers. Sime and Travers received a joint check for $25,000, which they divided equally; and Sime's debt to E. R. & W. was duly cancelled. Although Sunday told Sime that the offer of a net price of about $15,600 for Sime's interest was not disproportionate to what he was receiving for his interest, it was shown that Sunday, in fact, received more than $100,000. The settlement was handled through an escrow but none of the escrow papers disclosed that the Smith litigation was controlled by the Maloufs and Lawson or that Ball was not the owner in his own right of the majority shares of E. R. & W. The Smith litigation, in which an appeal from an adverse judgment had been perfected by the plaintiffs therein, was voluntarily dismissed by them on June 17, 1940 after the aforesaid settlement had been consummated and Farmer had been put in possession of all of the assets of the Burbank project. Subsequently, certain of the minority stockholders of E. R. & W. filed an action entitled Ben A. Walter et al. v. Paul T. Sunday et al., against the same defendants as in the present action, in which a judgment for fraud arising in part out of the same facts as are here involved was recovered in the amount of $225,000 on December 30, 1943. By stipulation, the judgment was subsequently vacated and a settlement reached. Shortly after this judgment was rendered Sime, who had not participated in the action, read the findings of fact therein and learned for the first time that the Maloufs and Lawson controlled the Smith litigation, Ball was their agent and had no personal interest in E. R. & W., Farmer also had acted as their agent in the purchase, and Sunday had received more than $100,000 in the settlement. The present action was commenced on February 3, 1944.

The foregoing statement summarizes the essential features of the complaint as incorporated by reference in findings made by the trial court after a trial covering some 140 trial days, the proceedings in which are presented to this court in the form of a 51 volume reporter's transcript of more than 16,000 pages. The court also made findings to the effect that the defendants conspired to fraudulently deceive plaintiff and acted in concert in acquiring plaintiff's interest in the project; defendants stood in a fiduciary relationship to plaintiff at the time they purchased his interest; plaintiff in 1937 became the owner of a 25 per cent (later reduced by agreement to a 22-½ per cent) interest in the project as a joint adventurer with E. R. & W. and Sunday; plaintiff had no knowledge whatsoever, and no means of learning, prior to December 30, 1943, that defendants Ball and Farmer were the agents of the Maloufs and Lawson or that the Smith litigation, which depreciated the marketability of the bonds, was under their control; the dismissal of Sime's cross-complaint and the execution of the release were procured as part of the conspiracy and fraud perpetrated by the defendants; and but for the fraud of the defendants, plaintiff and his coadventurers could have successfully liquidated the project at substantial profit to themselves. As part of its conclusions of law the trial court held that plaintiff was not barred by the statute of limitations or by laches, and that the dismissal of his cross-complaint in the Sunday action and the release which he had executed in connection therewith did not constitute res judicata or an estoppel. Further facts material to the disposition of the appeal appear in the discussion which follows.

Appellants have additional counsel on the appeal. They have presented one set of briefs which raise the following points: (1) The action is barred by the statute of limitations and laches; (2) it is barred by a voluntary dismissal with prejudice of Sime's cross-complaint in the action of Sunday v. Edgerton, Riley and Walter et al; (3) it is barred by a release executed by Sime; (4) the judgment based upon findings of fraud is without support in the evidence; (5) there was a defect of parties plaintiff in the failure to join Tad Travers, Kathleen Travers and Iona H. Sime as parties to the action; (6) it was error to render a money judgment against defendants as joint adventurers without terminating the joint adventure.

An additional set of briefs has been filed on behalf of appellant Ball by the attorney who represented the defendants in the trial. In his supplemental opening brief the following additional points are made: (1) That the written agreement relied upon by plaintiff as evidence of the joint adventure arrangement was not duly executed by Edgerton, Riley and Walter; (2) plaintiff was not and could not be defrauded; when he sold his interest in the venture he knew what it was worth.

[1, 2] It is in order to consider first the point raised in the supplemental briefs of Ball that the contract between plaintiff and E. R. & W. was not binding upon the latter because it had not been authorized or ratified by the corporation's board of directors. The written agreement bore the seal of the corporation, which was presumptive evidence of due execution. Corp.Code, sec. 833; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 597–599, 99 Am.Dec. 300. It bore the signature of the president and secretary of the corporation. It was shown by various exhibits that it was the practice for Mr. Edgerton, as president, to execute contracts of employment. There was also evidence that the terms of the agreement were known to the directors, and were satisfactory to them. The parties operated extensively under it and the corporation received the benefit of Sime's services with full knowledge of its terms. The finding that the agreement was duly executed was made upon conflicting evidence and finds ample support in the record. See Security Bldg. & Loan Ass'n of California v. Seibert, 6 Cal.App.2d 54, 44 P.2d 416. It is unnecessary to discuss the further finding that the agreement was ratified by the corporation on or about February 6, 1939. As we say, the findings that the agreement was duly executed and later ratified are attacked only in the supplemental briefs of

appellant Ball. The contention is clearly without merit.

[3] We shall consider next the contention that the transaction by which defendants acquired Sime's interest in the Burbank property was free of fraud. Upon this issue plaintiff relies heavily upon the finding that a fiduciary relationship existed between Sime and the defendants Ball, Malouf and Lawson throughout the questioned transaction. In the principal briefs of the appellants it is not seriously contended that such a fiduciary relationship did not arise out of the initial contract, although it is strenuously urged that if it ever existed it had been terminated before Sime disposed of his interest. In the supplemental briefs of appellant Ball it is insisted that no fiduciary relationship existed at any time, and it is argued also, in the alternative, that if it did exist in the beginning it had been destroyed before plaintiff sold his interest. It is conceded, of course, that if the status of defendants was that of fiduciaries, they were under a greater duty of disclosure than would otherwise rest upon them. The concealment of which they were found guilty was clearly such as the law does not tolerate in fiduciaries. See Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1; 14 Cal.Jur., secs. 4, 7, pp. 763, 766. It is unnecessary in this connection to elaborate upon the facts. The transaction, as established by the findings, may be summarized as follows: Defendants, joint adventurers with plaintiff in the purchase of bonds and the acquisition of real property through use of the bonds, acting in concert, maintained and controlled litigation to depress the marketability of the bonds; they concealed from plaintiff that they owned a controlling interest in the corporation which was a party to the joint venture with plaintiff; they produced a dummy purchaser through whom they proposed to acquire plaintiff's interest and the interest of the corporation in the project; they pretended they had made a sincere effort to find a purchaser for the corporation's interest and that the price offered by their agent was the best that could be obtained, and a fair price; they concealed the fact they were both buyers and sellers in the transaction, and they prevailed upon plaintiff to believe the sale in prospect was bona fide; plaintiff, realizing that the sale of the corporation's interest would necessarily terminate any further prosecution of the joint venture, and relying upon the good faith of Ball and Farmer, the agents of defendants, parted with his interest thus secretly acquired by defendants at a price far below its real value. There is no latitude for doubt that such conduct on the part of fiduciaries would render them guilty of actionable fraud and responsible in damages for the amount of plaintiff's loss. Cf. MacIsaac v. Pozzo, 81 Cal.App.2d 278, 183 P.2d 910. Defendants quite understandingly endeavor to escape the responsibilities of fiduciaries rather than to justify their conduct.

[4-6] It is contended in the supplemental brief of Ball that the parties were not engaged in a joint venture and, therefore, that no fiduciary relationship existed between them. It is said, "the essential elements of a joint venture are joint control and equal power to direct the enterprise," and that Sime did not have such control or power. Cited in support of the proposition are such cases as Pope v. Halpern, 193 Cal. 168, 223 P. 470 and Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385. In these and similar cases the requirement that there must be equality of control and authority in the undertaking to constitute the participants joint adventurers, was properly imposed where it was sought to impute to a rider in a vehicle contributory negligence of the driver. The cases are not at all in point here. The common definition of a joint adventure is, "a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge." 48 C.J.S., Joint Adventures, § 1, pp. 801, 802; see also Nelson v. Abraham, 29 Cal.2d 745, 749–750, 177 P.2d 931, and authorities there cited. Although it is true that without

special agreement one joint adventurer does not have authority to bind the others, and in this sense they have an equal right to control the management of the enterprise, cf. Beck v. Cagle, 46 Cal.App.2d 152, 115 P.2d 613; Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 84 P.2d 296, they may by agreement grant authority to one or more of their number which would not be implied from the relationship alone. Cf. Eagle Star Ins. Co. v. Bean, 9 Cir., 134 F.2d 755, 758; see also, Nowell v. Oswald, 96 Cal.App. 536, 274 P. 423, and Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379, holding joint venture existed although management was entrusted to one party only. The contract, together with evidence as to the operations of the parties under it, manifestly provided a sufficient basis for the finding that plaintiff was a joint adventurer with E. R. & W. and Sunday.

[7] It is also insisted that the defendants were merely stockholders of E. R. & W. and did not stand in a fiduciary relationship to Sime, even if the corporation did occupy that position. We cannot accord validity to this argument. Ball was president of the corporation and agent of the Maloufs and Lawson in the matter of the ownership of the controlling stock interest. The corporation was under fiduciary duties to Sime and could act only through its officers, directors and other agents. Only through them could it perform or violate its corporate duties. Since the Maloufs, Lawson, and Ball had control of the corporation, it was their duty to see that the corporation fulfilled its obligations as a joint adventurer. They were responsible for the corporation's breach of duty. Their wrongdoing was not as mere individuals, but as individuals who controlled the corporation. It was through their actions that the duties of the corporation were violated, and they were in fact the wrongdoers. It is idle to contend that stockholders and officers who exercise complete control over the affairs of a corporation may with impunity purposely cause the corporation to violate its duties as a fiduciary, or commit other frauds through the medium of the corporation. See Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 146, 80 P.2d 723; Hillman v. Hillman Land Co., 81 Cal.App.2d 174, 183–184, 183 P.2d 730; 6A Cal.Jur., sec. 22, pp. 75–79, and cases there cited. It is clear that defendants were under the duties of fiduciaries in matters wherein they controlled and directed the corporation as a joint adventurer.

[8] Appellants all make the further claim that even if a fiduciary relationship had existed, it had been terminated before Sime disposed of his interest to Farmer. They base their argument upon a letter written to Sime by R. A. Treacy, on January 28, 1939, stating that the agreement dated November 18, 1937, had not been authorized by the directors, or executed with authority, and would not be recognized by the corporation; upon evidence that Ball notified Sime, in the first week of December, 1939, that the contract was invalid, denied that Sime had any interest in the bonds or properties, claimed they were solely the property of E. R. & W., and ordered Sime to vacate the desk space he occupied in the office; also upon testimony that relations between Sime and Ball were thereafter strained, and the corporation disputed the rights claimed by Sime under the contract. It is also pointed out that Sime alleged in his cross-complaint that there was dissension and discord in his relations with his associates which was defeating the purposes of the venture. Although the court found the facts as related, it also found that the fiduciary relationship continued through the time when Sime disposed of his interest, or, in other words, that the attempted repudiation of the contract by Ball on behalf of the corporation, and the resulting circumstances, did not have the effect of terminating the relationship. This finding, in our opinion, has substantial support in the evidence.

[9-11] As a matter of law joint adventurers are fiduciaries. MacIsaac v. Pozzo, 26 Cal.2d 809, 813, 161 P.2d 449 and cases there cited; 14 Cal.Jur., sec. 4, p. 763. It appears to be contended by appellant Ball that the strained relations between Sime and himself had the effect of terminating the joint venture and, per-

force, any existing fiduciary relationship. The contention is not sustainable. The fact that persons engaged in a joint venture may quarrel or be at odds over the business in which they are associated, or may even be involved in litigation with one another, does not as a matter of law relieve them of their fiduciary duties. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 434, 159 P.2d 958; Wright v. Duke, 91 Hun. 409, 36 N.Y.S. 853, 859; Olivier v. Uleberg, 74 N.D. 453, 23 N.W.2d 39, 165 A.L.R. 974; 40 Am.Jur., sec. 130, p. 219. See also Ramos v. Pacheco, 64 Cal.App.2d 304, 309, 148 P.2d 704. Although such dissension may provide a sufficient ground for dissolution of the venture by a decree of a court of equity (annotation, 118 A.L.R. 1421; 30 Am.Jur., sec. 49, p. 703; 48 C.J.S., Joint Adventures, § 4, pp. 822–823), it is well settled that in the absence of such a decree, an agreement fixing the time of termination, or a voluntary abandonment of the enterprise by one of the parties, the agreement remains in force until its purpose has been accomplished or has become impossible of fulfillment; and while it is in force, ordinarily one joint adventurer has no right to exclude another, or to withdraw himself from the arrangement, in order to act independently in respect to the subject matter. San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 115 Cal.App. 238, 248, 1 P.2d 1008, and cases there cited; see also Zeibak v. Nasser, 12 Cal.2d 1, 12–13, 82 P.2d 375; In re Gotfried, D.C.Cal., 45 F.Supp. 939; 30 Am. Jur., sec. 44, p. 701. The successful consummation of a fraud would be a relatively simple matter if the mere negation of the agreement, or the provocation of strained relations, were sufficient to exempt one joint adventurer from his duty of highest good faith to his associates. See Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786, 120 A.L.R. 720. Appellants have referred us to no evidence which would have required the court to find that the joint venture had been terminated prior to the sale. Upon the contrary the answer of Ball in the action of Sunday v. Edgerton, Riley & Walter, to be referred to hereafter, admitted the contract relationship, as set forth in the first two paragraphs of the joint venture agreement although it denied the validity of the remainder. For these reasons, and also because of circumstances to which we shall presently refer, the finding that a fiduciary relationship existed at the time of the questioned sale has sufficient support in the evidence.

[12, 13] Compliance with fiduciary duties is exacted as a matter of law from parties to various technical relationships, such as partnerships and joint ventures. But entirely apart from such instances, a fiduciary status may exist as a matter of fact where it would not otherwise be inferred from the mere relationship of the parties. Bank of America v. Sanchez, 3 Cal.App.2d 238, 243, 38 P.2d 787; 36 C.J.S., Fiduciary, p. 743. One who voluntarily assumes a position of trust and confidence is a fiduciary, and he remains a fiduciary as long as trust and confidence are reposed in him. Civ.Code, sec. 2219; see also Robbins v. Law, 48 Cal.App. 555, 561, 192 P. 118. This status may, of course, continue in fact in the case of partners or joint adventurers after the dissolution of their association, although dissolution would normally end the fiduciary status imported by law as an incident of the association. Thus, even if it should be assumed arguendo, that the joint venture was at an end before the assets were sold, it would not necessarily follow that the fiduciary relationship also had been terminated. The extended arguments of appellants are to the effect that the court was obliged to find, on the evidence, that Sime did not repose trust and confidence in Ball, and that it would follow that there was no fiduciary status. We see no reason to question the implied finding that Sime did repose trust and confidence in Ball. He testified that he actually believed Ball's representation that he was the owner of the controlling interest in E. R. & W. He trusted in his honesty and veracity at least to that extent, and it is evident from the fact that he joined in the sale that he believed the representations of Ball that under the existing conditions $50,000 was a fair price for the E. R. & W. interest. True, he had initially objected to the price and insisted that the bonds were

worth far more, but the best evidence that he finally agreed with Ball as to the advisability of making the sale is that he sold his own interest at a comparable price. It was a question of fact for the trial court whether a disruption of the friendly relations between Sime and Ball had the effect of destroying Sime's confidence in Ball with relation to the particular matter of Sime's disposition of his interest. Appellants would have us reverse the trial court's finding upon these questions of fact. Manifestly this cannot be done. The evidence did not establish that the fiduciary relationship had ceased to exist as a matter of law, and there was substantial evidence that it did, in fact, exist, as the court found. Cf. Hobart v. Hobart Estate Co., supra.

[14, 15] There can be no doubt that, irrespective of any fiduciary relationship, the conduct of the defendants constituted actionable fraud. The intentional and systematic concealment by the defendants of highly material facts, which were peculiarly within their knowledge and which Sime did not suspect and could not have discovered, was fraudulent. See Herzog v. Capital Co., 27 Cal.2d 349, 353, 164 P.2d 8, and authorities there cited; 37 C.J.S., Fraud, § 16, pp. 245, 246; 23 Am.Jur., sec. 80, p. 857. This was not a mere attempt, as a matter of good business, to prevent Sime from inflating his price above a reasonable figure through non-disclosure of prospects and plans for future promotion of the venture by the purchasers. Cf. Hays v. Meyers, 139 Ky. 440, 107 S.W. 287, 288, 32 Ky. Law Rep. 832, 17 L.R.A.,N.S., 284, 139 Am.St.Rep. 493. Moreover, there was more here than mere silence as to information equally within the reach of both parties. The defendants not only had exclusive knowledge of the material facts, but knew that Sime was acting under a misapprehension, which they had cultivated, that the Smith suit and the sale to Farmer by E. R. & W. were bona fide. "The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 9 S.Ct. 101, 103, 32 L.Ed. 439, 441. It is significant that the Maloufs and Lawson concealed their identity by proceeding entirely through agents acting ostensibly in their own behalf. Although normally it would not be permissible to derive any inference of fraudulent intent from the fact, standing alone, that one sells or purchases property secretly through an agent, such an inference may be warranted by special accompanying circumstances. See Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853; Traer v. Clews, 115 U.S. 528, 6 S.Ct. 155, 29 L.Ed. 467; Beard v. Campbell, 2 A.K.Marsh. 125, 9 Ky. 125, 12 Am.Dec. 362. Here the secret employment of Ball and Farmer as seller and purchaser, respectively, of E. R. & W.'s interest, was the very essence of the fraud; for, had the defendants acted openly, the purported sale would have been clearly revealed to be a mere sham and the price of $50,000 an arbitrary figure set by defendants instead of the highest price obtainable on the open market. Similarly, concealment of their identity as the financial supporters of the Smith litigation was a major, and clearly fraudulent, feature of the conspiracy. The contract between E. R. & W. and the City of Burbank which provided the means by which the defaulted bonds were to be converted into real property, was one of the most valuable assets of the project. The Smith litigation cast doubt upon the enforceability of the contract, and thereby had the calculated effect of depressing the marketability of the joint venture assets by making ultimate success questionable.

[16] Proof that Ball repeatedly, and with knowledge of the untruthfulness of his statements, represented to Sime that he was the owner of a controlling interest in E. R. & W., that Farmer was a bona fide purchaser, and that the sale was a good one for a fair price, constitutes in itself a sufficient showing of fraudulent conduct. Insofar as it might be claimed that the last-mentioned statement was a mere opinion rather than a representation of

fact, that issue has been resolved in favor of plaintiff by the trier of fact. See Willson v. Municipal Bond Co., 7 Cal.2d 144, 151, 59 P.2d 974; Pullen v. Heyman Bros., 71 Cal.App.2d 444, 162 P.2d 961. In any event, an intentionally false affirmation of opinion or belief, being a misrepresentation of the state of mind of the speaker, Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 42 L.R.A.,N.S., 125, is actionable where, as in the present case, the one making it has superior knowledge or special information concerning the subject matter of the representation. Union Flower Market v. Southern Cal. Flower Market, 10 Cal.2d 671, 676, 76 P.2d 503, and cases there cited; People v. Gordon, 71 Cal.App.2d 606, 625-626, 163 P.2d 110; 37 C.J.S., Fraud, § 10, p. 230. Ball's statements were actionable also for the further reason that having undertaken to advise Sime concerning the sale, he was charged in law with the duty to make a full and fair disclosure of all the material facts within his knowledge. Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7; American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 65, 98 P.2d 497.

[17] Defendants challenge the sufficiency of the evidence to justify the findings upon the defense of the statute of limitations. The limiting statute which applies in a fraud action is section 338, subdivision 4, Code of Civil Procedure, namely, three years after the discovery of the fraud. Section 19 of the Civil Code is to be read with section 338, subdivision 4, and reads: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Plaintiff's complaint herein was filed on February 3, 1944.

It is asserted and argued at length "that this record demonstrates that Sime knew every essential fact of his present alleged cause of action more than three years before it was commenced." On this point it is said, "the evidence is solely, overwhelmingly, solidly and indisputably one way." The court made the following finding: "The court finds that the plaintiff did not learn of the fraudulent conduct of the defendants and of the conspiracy as alleged in the complaint herein, and all as found by the court herein, until after December 30, 1943, upon which date certain findings of fact and conclusions of law, and a judgment in the sum of $225,000.00, were filed against the defendants in a certain cause entitled Ben A. Walter, et al., plaintiffs, vs. Paul T. Sunday, et al., defendants, the same being cause number 479908 of this court and the said defendants therein being identical with the defendants in the within action." It was further found that until after December 30, 1943, plaintiff had no knowledge whatsoever of the business transactions of defendants Ball and Lawson with defendants Malouf, and the corporate defendants, or that any of the defendants had under their control the lawsuit of W. E. Smith v. City of Burbank et al. There was a conclusion of law that the action was not barred by the statute of limitations, and there were findings to the effect that the acts and conduct of the defendants constituting the alleged fraud were knowingly concealed by the defendants and were not available to plaintiff "except through a disclosure made by some witness sworn to tell the truth," and that plaintiff first learned of the same through the findings of December 30, 1943, in the action of Walter et al. v. Sunday, et al. It was effectually found that plaintiff did not, prior to that time, have knowledge sufficient to put him on inquiry as a prudent man, as to the existence of the facts constituting the fraud. It was also effectually found that by prosecuting an inquiry plaintiff would not have learned such facts. The question as to the statute of limitations is whether these findings are supported by substantial evidence.

Defendants rely chiefly upon certain allegations of plaintiff in his cross complaint in the action of Sunday v. Edgerton, Riley and Walter et al. The complaint in that action was filed January 10, 1940; Sime was made a defendant and he filed his cross-complaint January 17, 1940. It is contended that he pleaded practically the identical cause of action which is pleaded in his complaint in the present action. It is pointed out that there is great similarity in the two pleadings. Each of them gives a history of the transactions between the parties to the time of the filing of Sime's cross-complaint. Paragraph XIV of the cross-complaint reads as follows: "This cross-complainant is informed and believes, and upon such information and belief alleges the fact to be that said alleged sale of said bonds to Zack Farmer was but a pretended sale, and not a sale in fact, and if made at all, which this cross-complainant says it was not, it was made in furtherance of a scheme and design by parties unknown to this cross-complainant, to the end that such unknown persons might acquire the interest of this cross-complainant for themselves and thus, for a nominal consideration to this cross-complainant, to terminate all his right, title, and interest in said bonds. This cross-complainant is informed and believes, and upon such information and belief alleges the fact to be that his one-half interest in said bonds is reasonably worth in excess of the par value of said bonds, that all matters affecting the realization of the returns to be had by the use of said bonds have been done, that aside from two lawsuits now pending on appeal, and in which lawsuits the judgment is in favor of these several joint adventurers, the road is cleared for an immediate realization of the purposes of said venture, that it only remains now to sell the properties whereby a liquidation of said bonds may be had, that there are now available, for the purpose of such liquidation, in excess of 470 unimproved parcels of land that are reasonably worth in excess of $450,000., that said purported sale hereinbefore referred to is a plan and scheme fostered and put into effect by the controlling interests in the cross-defendant Edgerton, Riley and Walter corporation, Zack Farmer, and other persons unknown to this cross-complainant, to now reap the profits of this venture for themselves to the exclusion of the interest and right of this cross-complainant." In substance, the relief sought by the cross-complaint was that E. R. & W., Zack Farmer, and all persons acting in conjunction with them, be restrained from selling the bonds or other properties of the joint venture and from selling or otherwise dealing in one-half of the bonds and property claimed by Sime to be his property. There were prayers for incidental relief. It is contended by defendants that these allegations, made upon information and belief, show conclusively that plaintiff had knowledge, actual or constructive, of the facts which he claims were concealed from him and upon which the court based its findings and conclusions of fraud.

There was no evidence that, prior to December 30, 1943, plaintiff had any knowledge that the defendants were controlling the Smith suit or that any of them had any interest in the purchase, or that the Maloufs were the owners of the stock of E. R. & W., which stood in the name of Ball. Upon the contrary, plaintiff testified that he had no such knowledge. He testified that the phrase, "pretended sale," as used in his cross-complaint, merely referred to his contention that in selling its interest in the project, E. R. & W. was attempting to sell, without Sime's consent, assets in which Sime also claimed to have an interest as joint adventurer; and that that was what his cross-complaint was about. The finding that plaintiff had no knowledge of the facts constituting the fraud at the time of the sale was in accord with his testimony and we cannot agree that it is unsupported.

[18, 19] As to the claim of constructive knowledge, the issue was whether plaintiff had notice of facts sufficient to put a prudent man upon inquiry and if so, whether an inquiry, reasonably conducted, would have disclosed to him the true state of affairs. This question, of course, was one of fact for the trial court. Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 312, 163 P. 47; Taylor v. Wright, 69 Cal.App. 2d 371, 384, 159 P.2d 980. The finding that plaintiff had no such notice, if based upon conflicting evidence or reasonable inferences from the evidence, may not be disturbed by this court. The burden was upon the defendants to lay before us all the evidence which has a material bearing upon

their claim that there was no substantial evidence to support the finding. They have done so at some length. Our attention is called to the following facts: There was evidence that in April or May, 1940, plaintiff was introduced to one of the defendants Malouf by Farmer as one of Farmer's associates. He knew that Ben Mar Hills Corporation was interested in the Burbank project and that the Maloufs and Farmer were connected with the corporation. He had this knowledge in the spring of 1940. In January, 1941, he knew that Ben Mar Hills Corporation had acquired through Farmer all the interest of Sunday in the project. On January 28, 1941, Ben Mar Hills Corporation wrote a letter to Sime, in which it was stated that the corporation had made "the deal with Edgerton, Riley & Walter and Paul T. Sunday" in order to eliminate the opposition of Sime and Travers. Sime received this letter through the mail. In March, 1941, Sime and his associate Travers, sold to Ben Mar Hills Corporation the bonds they had acquired subsequent to February 20, 1940. The agreement of sale which memorialized negotiations taking place in January, 1941, recited that Farmer had acquired for Ben Mar Hills Corporation the interests of E. R. & W. and Sunday in the Burbank project. It was alleged on information and belief in Sunday's complaint, filed January 10, 1940, that Farmer was not acting as a principal in the contemplated sale but as the agent of a principal, whose identity was unknown to Sunday. This allegation was admitted in the answer of Sime. The answer of E. R. & W. admitted that Farmer was not a principal, and alleged that the identity of the principal was known to Sunday although no one was named as such. With reference to these facts, to plaintiff's testimony, and the allegations of the pleadings the brief of appellants states "the foregoing shows that more than four years before the present action was commenced plaintiff Sime had knowledge of every element of the present case except possibly that he did not know the actual names of the 'unknown persons' to whom he referred in his cross-complaint." It is said "in the light of this knowledge acquired by Sime during 1940 no one except the Maloufs could possibly have been the unknown persons referred to in the Sime cross-complaint." It appears to be contended that Sime should have made all possible deductions from the later association of the Maloufs and Farmer, and therefore was to be charged with notice that the Maloufs and Lawson were the owners of the stock which stood in the name of Ball. It is difficult to see how the disclosure to plaintiff in the Spring of 1940 that the Maloufs were interested with Farmer in the ownership of the bonds would have made clear that Farmer had acted as their agent in the purchase of the bonds or tended in any degree to connect them with the ownership of stock in E. R. & W. The argument leads back to the allegations of Sime's cross-complaint. He had alleged on information and belief that the sale to Farmer was in reality a sale to the controlling interests in E. R. & W. and other persons unknown to him. While this, of course, was an admission that he had some information and belief on the subject, the critical issue in the present action was whether he had such information, and if so, the nature and extent of it. He testified at the trial that he had no information to that effect, although he suspected that some scheme was on foot which would operate to his disadvantage. He did not know, or even suspect, that Ball was not the owner of the controlling interest in E. R. & W. or that the Maloufs or Lawson had any interest therein. Upon the contrary, he alleged in his cross-complaint in the Sunday action that Ball was the owner of the stock that stood in his name. Ball made an affidavit which was filed in the same action that he was the owner of the stock, and Sime testified that he believed it to be a fact until he discovered to the contrary in December, 1943. Ball also stated in his affidavit that Farmer was a bona fide purchaser and was financially able to carry out the proposed purchase.

The cross-complaint may reasonably be construed as alleging on information and belief that Ball and other persons unknown to Sime were using Farmer as a dummy through whom they proposed to acquire the E. R. & W. interest and Sime's interest. So construed it was clearly contradictory of his testimony that he had no information whatsoever that any of the stockholders of E. R. & W. were in league with Farmer. If he had been in possession of information which indicated that Farmer was acting for the majority stockholders, common prudence would have required that he make diligent inquiry into the facts. But there was ample evidence at the trial that he did not have knowledge or information to support the allegation until he read the findings in Walter v. Sunday, et al. as the court found.

[20-23] The court found that the Maloufs and Lawson conspired with Ball to acquire Sime's interest for themselves for as little as possible, and that they artfully concealed all the facts which would have given indication of the existence of the conspiracy. The argument of defendants on the point of notice is but slightly more than a claim that the allegations of plaintiff's cross-complaint, based upon information and belief, were conclusive upon that question. It was for the trial court to weigh Sime's testimony against any conflicting admissions or declarations he had made, and it was not unreasonable to conclude that the allegations of the cross-complaint were founded on mere suspicion that Farmer was perhaps acting as agent of the owners of the controlling interest in E. R. & W. The rule of constructive notice demands that "'* * * There must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter. Circumstances that are dubious or equivocal are not sufficient to take the place of actual notice. * * * The rule imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact or facts can be said to furnish a clue. It does not impute notice of every conceivable fact and circumstance however remote which might come to light by exhausting all possible means of knowledge.'" West v. Great Western Power Co., 36 Cal.App.2d 403, 407, 97 P.2d 1014, 1017, quoting from 46 C.J. 546, 547. See also Victor Oil Co. v. Drum, 184 Cal. 226, 240–241, 193 P. 243. The circumstances must be such that further inquiry is not merely suggested, but becomes an imperative duty, and failure to make it constitutes a negligent omission. Zeller v. Milligan, 71 Cal.App. 617, 623–624, 236 P. 349; Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759; Twining v. Thompson, 68 Cal.App.2d 104, 112–113, 156 P.2d 29; Hobart v. Hobart Estate Co., supra, 26 Cal.2d 412, 438, 159 P.2d 958 and cases there cited. The decision on the issue of notice was one of fact. It cannot be held, as a matter of law, that the facts known to Sime prior to February 3, 1941, were sufficient to put him on inquiry. The findings to the effect that he had no such knowledge or notice are supported by substantial evidence, and with that determination the question ceases to be one of law.

[24] Defendants cannot prevail on the point of discovery unless the record shows, as a matter of law, that avenues of inquiry were open to Sime, which, if explored, would have resulted in discovery of the fraud. In order that one who claims to have been defrauded be charged with constructive knowledge of the facts constituting the fraud, it must appear not only that he had notice of facts sufficient to put a prudent person upon inquiry, but also that means for the discovery of the facts were available to him. Hobart v. Hobart Estate Co., supra, 26 Cal.2d at page 435, 159 P.2d 958; West v. Great Western Power Co., supra, 36 Cal.App.2d 403, 407, 97 P.2d 1014; Adams v. Harrison, 34 Cal.App.2d 288, 299, 93 P.2d 237. It is argued by defendants that inquiry made of some of the defendants would have developed the facts constituting the conspiracy, and that if plaintiff had taken depositions in the action of Sunday against E. R. & W. he would thus have uncovered the facts. A sufficient answer is that the trial court did not believe the means of discovery were available to plaintiff in a practical sense. We have no hesitation in agreeing with this view. Plain-

tiff could not fairly have been charged with notice of facts which he could have learned only out of the mouths of the conspirators, who were successfully endeavoring to conceal them. Adams v. Harrison, supra, 34 Cal.App.2d 288, 299, 93 P.2d 237; see also Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39; Kane v. Cook, 8 Cal. 449; Marshall v. Buchanan, 35 Cal. 264, 95 Am.Dec. 95. It was a question of fact whether means were available to plaintiff for the discovery of the frauds and the finding on that issue was a reasonable deduction from the evidence.

[25] Another answer is that there was substantial evidence that Sime was dissuaded from pursuing the investigation and prosecuting his cross-complaint by the very frauds which the defendants claim he should have uncovered. Sime testified that both before and after he filed his cross-complaint Ball made positive representations to him that he, Ball, was the owner of the controlling interest in E. R. & W., that he did not regard the bonds as a good investment for E. R. & W., and that he considered $50,000 to be a fair price for the company's interest. He testified that he believed these representations and relied upon them in parting with his own interest. Even if it should be conceded that he suspected the facts to be other than as represented by Ball, his testimony was to the effect that these suspicions were allayed by the positive representations of the latter, and this testimony, if believed by the court, would have furnished a sufficient excuse for Sime's failure to make further investigation. It is well settled that one who has acted in a manner which would reasonably induce another to forego or discontinue an investigation of his fraudulent acts will not be heard to say that the facts would have been developed had inquiry been made. Kalkruth v. Resort Properties, Ltd., 57 Cal.App.2d 146, 150, 134 P.2d 513, and cases there cited; Dow v. Swain, 125 Cal. 674, 683, 58 P. 271.

It appears from the foregoing that the trial court's conclusion that the action was not barred by the statute of limitations rests upon findings that have ample support in the evidence, both direct and circumstantial. In fact, plaintiff's contention that he discovered the fraud of defendants within the three year period immediately preceding the commencement of his action was quite firmly established.

Defendants urge that the action was barred by releases executed by plaintiff. Reliance is placed chiefly upon the release of February 14, 1940, executed by plaintiff and his wife, and Tad Travers and his wife, in favor of E. R. & W., Paul T. Sunday and B. L. Ball. Brief reference is also made to a provision of a contract between Sime and Ben Mar Hills Corp., executed subsequent to the sale, and purporting to deprive Sime of "the right to participate further in any deals, negotiations, transfers, suits" concerning the property in question. This agreement, upon its face, is wholly insufficient to bar the present action, and need not be discussed further. The former instrument, on the other hand, was a general release of all claims, causes of actions, etc., and also a release of "any claim or claims arising out of or connected with the so-called Ben Mar Hills joint venture involving certain City of Burbank Bonds, etc." It was executed as a part of the transaction in which defendants acquired plaintiff's interest in the project. On January 8, 1944, plaintiff made written demand upon defendants that he be restored to his right as a joint venturer. He offered to do equity, but made no offer to restore the consideration he had received in the sale. The court found that he was not required to do more in order to maintain his action. Defendants say, "the rule in our opinion is without conflict in this state that a release of a claim for unliquidated damages is an absolute bar to the prosecution of such a claim unless there has first been a rescission of the release and return of the consideration received therefor," and further, "it is only where the action is not on a disputed claim —that is, one which is undisputed in amount—that a party may retain the consideration paid for a release and sue for sums in excess thereof." Plaintiff replies that the release may not be construed as applying to his present claim for damages for the reason that at the time it was given he was asserting no claim against defendants, had no knowledge that he was being defrauded, and consequently had no intention to release a claim that arose out of the transaction in which the release was given. For various other reasons he denies that he was required to rescind.

[26-29] We shall consider first the scope of the release. It was prepared by defendants and is to be construed most strongly against them. In our opinion, it did not embrace the claim which is the subject of the present suit. In the first place, the claim did not arise out of the joint venture and was not connected therewith. It came into existence only upon the completion of the purchase by defendants which was a wholly separate transaction. The release related to claims having origin in the joint venture relationship. Since this was terminated through the sale, the release should be understood as terminating also any existing claims of Sime as a joint adventurer such as the right to an accounting and claims of that nature. The release was special as to such claims, and it was clearly the intention of the parties to waive enforcement of any rights arising out of the joint venture that may have existed at the time. That such was their intention is demonstrated by the fact that a release in identical terms was executed by E. R. & W. and Sunday in favor of Sime. The parties in this manner agreed there would be no aftermath of that enterprise. In the second place, it would have required a special reference to the sale transaction to bring it within the terms of the release. There was no such reference. While the release was in general terms, and was also specific as to claims arising out of or connected with the joint venture, it was not specific in any other respect, and it is to be construed in the present connection as a general release. So construed it would not embrace claims unknown to Sime, and which he did not intend to release. Section 1542, Civ.Code. The evidence is clear to the effect that Sime had no intention of releasing any claim for damages in case it might develop that he was being defrauded in the sale. In the third place, if the release be deemed ambiguous as to the intention of the parties respecting the possible coverage of plaintiff's claim for damages, the court could properly have considered any testimony of the parties bearing upon their intentions and understandings. It would scarcely lie in the mouths of the defendants to say that they understood or intended that the release would shield them from the consequences of fraud in the purchase transaction. If it was their intention to obtain a release from the consequences of the very frauds they were committing, of which Sime was ignorant, and if they incorporated in it language designed to accomplish that purpose, this in itself, would have constituted a fraud upon plaintiff, rendering the release void and rescission unnecessary. See Garcia v. California Truck Co., 183 Cal. 767, 770, 192 P. 708, discussing Meyer v. Haas, 126 Cal. 560, 58 P. 1042. We do not, however, take this view of the case. As we have said, the mutual releases were in proper form to close the joint venture and they served no further purpose.

[30, 31] If we were to assume, arguendo, that the instrument executed by plaintiff did constitute a release of the present cause of action for fraud, it would nevertheless follow that a restoration to defendants of the $15,600 received by plaintiff was not necessary to an effective rescission of the release as a prerequisite to the action. Taylor v. Hopper, 207 Cal. 102, 276 P. 990; Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667, and Winstanley v. Ackerman, 110 Cal. App. 641, 294 P. 449, upon which appellants rely, treat of fraudulently procured releases of claims which, both before and after the execution of the release, were disputed as to right and as to amount. The Taylor and Garcia cases were personal injury cases; Westerfeld was suing upon an insurance policy which the defendant claimed had lapsed; and Winstanley was a wrongful death action. In such cases it is clear that the plaintiff must restore what he has received in settlement of the disputed claim before suing upon it. He cannot retain the benefits of the release and sue, for to sue would violate the terms of his bargain. To hold otherwise would frustrate the very purpose of the release and destroy its effectiveness as a favored device for eliminating litigation. Hence rescission is necessary; and may be effectively accomplished only by returning the entire consideration received, for if plaintiff should fail to establish his cause of action, he would not be entitled to retain anything. The rule in such circumstances appears to be well settled. Equally well-established, however, is the exception to the rule: A restoration is not necessary, in order to avoid the bar of a release, where there is no question as to the right of the plaintiff, arising independently of the release itself, to retain what he received. Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598; Kales v. Houghton, 190 Cal. 294, 212 P. 21; Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Richards v. Fraser, 122 Cal. 456, 55 P. 246; Gilson Quartz Min. Co. v. Gilson, 47 Cal. 597. The law does not require, as the price of attack upon a fraudulently induced release, sacrifice of independent rights, or the doing of idle acts. See De Garmo v. Petitfils Confiserie, 93 Cal.App. 261, 275, 269 P. 692. General language in some of the cases intimating that the exception is applicable only where the liability sued upon is undisputed both as to existence and as to amount, is shown by the holdings in the Walsh, Kales, and Richards cases to be inaccurate, unless restricted to the particular facts before the court. In these cases, the amount of the defendant's ultimate liability was in dispute, but it was nevertheless shown clearly that the plaintiff would in any event be entitled to retain what he had previously received, whether he prevailed or not in the action. The facts of the case at bar show it to be governed by the exception to, rather than the rule of restoration. If plaintiff established his claim, the $15,600 already received would be deducted from the total amount found to be due (as it was by the court below); if, however, he failed to prove the alleged fraud, he would be entitled to retain the $15,600 as the contract consideration for the transfer to defendants of his interest since they stood upon the purchase and retained the property.

Even if it be conceded, arguendo, that one of the circumstances moving the defendants to pay the money was that a release would be executed there is no basis for a contention that any part of the $15,600 was paid for a release of the claim now in suit or that there was any consideration other than the mutual releases. There would have been, in fact, nothing to restore to the defendants upon the cancellation of the release unless Sime had also desired to rescind the sale. He did not attempt to do this, nor was he required to, in order that he might be free to sue for damages. Rescission and restoration are required only under equitable principles and to prevent the taking of unfair advantage. Restoration is not required unless the ends of justice require it. The argument of defendants would lead to this result. Sime, although affirming the sale transaction, would have been required to give notice of rescission of the release and restore the $15,600 which he had received from the defendants while the latter kept his property. This would truly be an innovation of substantive right and procedure. As the case of Montes v. Peck, 112 Cal.App. 333, 296 P. 624, illustrates, the rules respecting rescission relied upon by defendants have no application to such a situation. In that case, having discovered that the rentals under certain leases of real property being purchased were less than represented, the purchasers, in reliance upon the seller's fraudulent reassurances as to the rental income under the remaining leases, and in return for a substantial reduction in the price, released the seller from any further claim should it develop that the income was less than represented, and closed the sale. In holding that rescission and restoration of the consideration were not necessary before suing upon the fraud in respect to the remaining leases, the court treated as controlling the fact that the sale and release were but one transaction, permeated throughout by the same fraud. Noting that rescission of the release alone, as a part of an entire transaction, and restoration of the consideration, would work an injustice upon plaintiffs the court held that they were entitled to stand on their contract and sue for damages without either a restoration or offer thereof, saying: "Having chosen this remedy to which they are entitled, we think the purported release, which was a part of the entire contract, may not be segregated from the rest of the agreement, nor may the respondents be required to rescind as to that portion of the agreement, while permitted to sue for damages on the other part." 112 Cal.App. at page 341, 296 P. at page 628. This holding, in our opinion, is squarely applicable here.

[32] We hold that no restoration of the consideration received by Sime, or any part of it, was required, for the reason that the release did not cover the claim in suit; for the further reason that it appears that Sime received no consideration for his release other than the releases received from E. R. & W. and Sunday in his favor; and for the additional reason that restoration of the consideration paid for the property was not required through any considerations of equity or justice, so long as Sime affirmed the contract, allowed defendants to keep his property, and sought only the recovery of damages.

[33] The briefs discuss at length the question whether the dismissal of Sime's cross-complaint in the Sunday suit operated as a retraxit and amounted to an adjudication that Ball, and therefore the Maloufs and Lawson, as joint tort feasors, had not been guilty of fraud in the sale transaction. Much that has been said with relation to the effect of the release applies to the contention of defendants that the dismissal of the cross-complaint operates as a bar to the present action. Either one would have been sufficient to accomplish the purposes of the parties. We deem it unnecessary to decide questions discussed in the briefs as to the effect that should have been given to the dismissal if it had been shown to be a voluntary abandonment of plaintiff's claims. A conclusive answer to the claim of res adjudicata is that the dismissal was obtained fraudulently. Its validity was directly attacked in the present action upon the ground of fraud; and the issue was tried and resolved in plaintiff's favor. It was vitiated by the judgment in the present action and became a nullity as an adjudication or abandonment of any of Sime's rights that may have been in issue in the Sunday action.

Defendants, quite properly, do not question the power of the court to make a complete determination of the entire controversy which arose out of the fraudulent conspiracy. Plaintiff clearly had a right to attack the release and the dismissal for fraud and, if successful, to be awarded full relief upon his cause of action, against which the release and dismissal were asserted. Young v. Young Holding Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723; Raynor v. Mintzer, 67 Cal. 159, 7 P. 431; 1 Cal.Jur., secs. 33 to 39 inc., pp. 348-359. The dismissal did not bar the present action.

[34] It was sought by the complaint to recover damages also from Sunday. It was alleged that Sime entrusted the settlement of his rights to Sunday, that Sunday represented to him that $15,000, or thereabouts, would not be disproportionate to the amount offered to Sunday for the sale of his interest, plaintiff believed the representations of Sunday, acted upon the same, and joined in the sale. The court found that Sunday had joined with defendants in the conspiracy and was to receive the sum of $150,000 for furnishing them a transfer of his interest and the interest of Sime. Upon motion for a new trial, the court made an additional finding that Sunday acted throughout without knowledge of the fraud of defendants. It is argued by the defendants that Sime acted independently in selling his interest, sold the same through Sunday in reliance upon the representations of the latter, that defendants were in no way responsible for his making the sale, and that consequently the concealments and representations of which they were found guilty could not have operated as an inducing cause of Sime's action. The argument was a proper one to make in the trial court, where it was necessary to de-

termine whether Sime was deceived by the conduct of the defendants into making a sale he would not otherwise have made. We do not see how the trial court could well have determined as a matter of fact that Sime parted with his interest, which he believed to have great value, without being influenced and induced thereto by the defendants' fraud; certainly such a conclusion cannot be reached as a matter of law. The actionable deceit for which defendants were found liable was not in misrepresenting the value of the bonds, but in creating a false set of circumstances which induced Sime to believe it was best for him to sell at the debased price; and even if the court had found that Sunday also had been guilty of deceit, that fact would not exculpate the defendants. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 717, 128 P.2d 522, 141 A.L.R. 1358; Elliott v. Federated Fruit & Vegetable Growers, 108 Cal.App. 412, 291 P. 681; 37 C.J.S., Fraud, § 39, p. 287.

[35] While we have discussed the release as if Sime alone had signed it, it will be recalled that it was a joint-release signed by Mr. and Mrs. Sime and Mr. and Mrs. Travers. $25,000 was divided equally between Sime and Travers, and Sime also received a release of indebtedness of $3,100 to E. R. & W. Defendants did not plead but on a motion to exclude evidence argued that there was a misjoinder of parties in that the other signers of the release were not joined either as plaintiffs or defendants, and this alleged defect of parties is urged on the appeal. However, the arguments on the point all proceed on the theory that before the present action could be maintained it was necessary that the release be rescinded by all signers thereof and the consideration received by all of them restored to the defendants. The premise being untenable, the contention that there was a defect of parties must fail. Sime alone had a cause of action for his damages. Travers was neither a necessary plaintiff nor defendant. The judgment affected the rights of Travers in no manner whatsoever.

[36] We think it is clear that damages were properly awarded plaintiff without decreeing dissolution of the joint venture and directing an accounting. The joint venture ended when Sime sold out to defendants and neither party to it retained a right to an accounting by the other. Moreover, plaintiff's claim was not one within the scope of the joint venture.

The judgment is affirmed.

WOOD, J., concurs.

VALLEE, J., did not participate.

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95 Cal.App.2d 220

RHODE ISLAND INS. CO. v. DOWNEY et al.

No. 14210.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1949.

Hearing Denied Feb. 16, 1950.

Original proceeding in mandamus by the Rhode Island Insurance Company, petitioner, against Wallace K. Downey, individually and as Insurance Commissioner, and others, to vacate appointment of the commissioner as conservator of the petitioner.

The District Court of Appeal, Bray, J., discharged alternative writ and denied peremptory writ upon ground that seizure of company was not as a matter of law arbitrary or an abuse of discretion.

Ward, J., dissented.

Prior opinion, 209 P.2d 72.

1. Insurance 🔑44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances, appointment may be made without notice even if an urgent emergency does not exist. Insurance Code, § 1011.

2. Insurance 🔑44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances, appointment without hearing was authorized even though commissioner was aware of most of the matters complained of for some time prior to making of application. Insurance Code, § 1011.

3. Insurance 🔑44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances, appointment ex parte and without notice is authorized even if the matters involved are disputable. Insurance Code, §§ 1011–1013.

4. Insurance 🔑42

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company if the company is "insolvent," a company may be "insolvent" even if it is in position to make available within a reasonable time sufficient moneys to meet promptly any demand which might in the ordinary course of events be made against it. Insurance Code, §§ 706.5, 1011.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Insolvent".

5. Insurance 🔑3

Insurance companies, like banks and building and loan companies, are charged with a public interest. Insurance Code, § 980 et seq.

6. Insurance 🔑42

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company if the company is insolvent, alleged insolvency was not merely technical where apparent impairment of capital amounted to approximately 48.5 per cent of company's stock par value, and company appeared to have been losing over $1,000,000 a year for the preceding three years. Insurance Code, §§ 981, 1011.

7. Insurance 🔑44

The statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances is applicable to a foreign insurance company which is doing business in the state. Insurance Code, §§ 1010–1062, 1010, 1011, 1018–1022.

8. Constitutional law 🔑305

"Due process of law" often requires prior full hearing but where public necessity requires, action may precede hearing.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Due Process of Law".

9. Administrative law and procedure 🔑13
Constitutional law 🔑312
Insurance 🔑4

The statute authorizing appointment of insurance commissioner as conservator of an insurance company if further transaction of business would be hazardous or if company is insolvent, does not violate due process because it authorizes seizure without notice or prior hearing, in view of provision for hearing after seizure. Insurance Code, §§ 1011–1013.

10. Insurance 🔑44

The statute providing for hearing after summary seizure of the assets of insurance company by insurance commissioner provides an adequate remedy and sufficient opportunity to show that seizure was unnecessary and unjustified. Insurance Code, §§ 1011, 1012.

11. Insurance 🔑4

The statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances does not authorize a transfer of title to assets outside of the state, and as applied to a foreign insurance company is not unconstitutional as an attempt to exercise power over assets not in the state. Insurance Code, § 1011.

12. Insurance 🔑44

Superior Court order appointing insurance commissioner conservator of the business of foreign insurance company and giving commissioner title to its assets "wheresoever situated", would be construed as referring to assets "wheresoever situated" within the state. Insurance Code, § 1011.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Wheresoever Situated".

13. Commerce 🔑57

California statute authorizing appointment of state insurance commissioner as conservator of an insurance company which has merged, consolidated, or reinsured without consent of the commissioner does not impose an unreasonable burden on interstate commerce. Insurance Code, § 1011.

14. Insurance 🔑4

The statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances relates to doing business in California, applies equally to domestic and foreign corporations, and is not discriminatory. Insurance Code, § 1011.

15. Insurance 🔑44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company if company has merged without commissioner's consent, if conditions hazardous to policy holders or the public exist, or if company is insolvent, commissioner was not as matter of law arbitrary in proceeding under the statute, in view of circumstances, though he might have pursued other less drastic remedies. Insurance Code, §§ 700, 704, 706.5, 1011, 12928.6; Government Code, § 11500 et seq.

16. Insurance 🔑44

As a matter of state policy, where insurance commissioner deems condition of insurance company hazardous, he should take over the company while matters are being threshed out, rather than chancing the loss which might result if alternative remedy of injunction were pursued. Insurance Code, §§ 1011, 12928.6.

17. Insurance 🔑10

The statute authorizing insurance commissioner to seek injunction against violation of statute or order is directed primarily to the stopping of certain acts within the state, rather than to a situation which requires restoration of capital, or to acts occurring outside the state. Insurance Code, § 12928.6.

18. Insurance 🔑44

Declaratory relief action initiated by insurance company did not bar insurance commissioner from proceeding summarily under the statute authorizing appointment of insurance commissioner as conservator of an insurance company if the company has merged without consent, if further transaction of business would be hazardous, or if company is insolvent. Insurance Code, § 1011.

19. Insurance 🔑44

Prime consideration in determining whether action of insurance commissioner in procuring his appointment as conservator of an insurance company was arbitrary, was whether such appointment was for protection of policyholders and the public. Insurance Code, § 1011.

20. Insurance 🔑44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company where hazardous condition exists, commissioner may use his judgment as to whether he should apply under the statute or select another remedy, and where it appeared from audit that particular company was insolvent and its condition hazardous, decision to proceed under the statute was not as a matter of law arbitrary. Insurance Code, § 1011.

21. Insurance 🔑44

Insurance company was not entitled to have appointment of insurance commissioner as conservator of the company vacated unless court could find from the admitted facts that commissioner as a matter of law had abused his discretion and had acted arbitrarily. Insurance Code, § 1011.

22. Mandamus 🔑3(1)

Mandamus will lie only when usual and ordinary forms of remedy are insufficient. Code Civ.Proc. § 1086.

23. Mandamus 🔑3(8)

The hearing provided for by statute after the ex parte appointment of insurance commissioner as conservator of an insurance company is an adequate remedy, and mandamus proceeding to compel vacation of appointment should not be used as a substitute. Code Civ.Proc. § 1086; Insurance Code, §§ 1011, 1012.

24. Insurance ⚿44

Failure to keep proper records is a circumstance to be considered by insurance commissioner in determining whether insurance company is in hazardous condition within statute authorizing appointment of commissioner as conservator of an insurance company if further transaction of business will be hazardous. Insurance Code, § 1011.

25. Insurance ⚿44

Under statute authorizing appointment of insurance commissioner as conservator of an insolvent insurance company, if record provides ground for reasonable belief by commissioner that company is insolvent under California law, it is immaterial that other state commissioners disagree and have not taken similar action. Insurance Code, § 1011.

26. Insurance ⚿44

Under statute authorizing appointment of insurance commissioner as conservator of an insolvent insurance company, auditor for commissioner was not as a matter of law wrong in crediting company only with guaranteed commissions and disallowing as assets certain unsecured notes. Insurance Code, § 1011.

27. Insurance ⚿44

Under statute authorizing appointment of insurance commissioner as conservator of an insurance company under specified circumstances, seizure of a foreign company does not necessarily result in automatic liquidation without possibility of rehabilitation, but if the conservator is unable to remove causes leading to the company's difficulties and if he is unable to effect rehabilitation, liquidation must follow. Insurance Code, §§ 1011, 1016.

28. Insurance ⚿10

Insurance commissioner cannot for personal reasons cause elimination of any individual connected with an insurance company, but where a course of conduct by individual has caused serious loss to the company, commissioner has right to require that those practices be abandoned.

29. Insurance ⚿10

Insurance commissioner is justified in objecting to the domination of insurance company by a particular individual if assets are impaired and operations are rendered hazardous.

Peart, Baraty & Hassard, San Francisco, California, Bronson, Bronson & McKinnon, San Francisco, California, for petitioner.

Fred N. Howser, Attorney General of the State of California, T. A. Westphal, Jr., Deputy Attorney General of the State of California, Harold B. Haas, Deputy Attorney General of the State of California, for respondents.

William E. Powers, Attorney General of the State of Rhode Island, amicus curiae.

BRAY, Justice.

Petition for a writ of mandate directing the superior court to vacate its "Order Appointing Conservator and Restraining Order" in a proceeding brought against petitioner by respondent Insurance Commissioner of the State of California. The questions involved concern the validity of the acts of respondent in seizing, by virtue of said court order, the California business and assets of the petitioner.

Record.

On May 17, 1949, said commissioner filed an application in the superior court under section 1011 of the Insurance Code, for an order making him conservator of the petitioner, directing him to take possession of all of its assets, records, and property, vesting title thereto in him, and enjoining it from transacting further business in California, etc. The application as permitted by section 1011 of the Insurance Code, was made ex parte and without notice. The order was granted forthwith. The application and order were served upon petitioner simultaneously with the seizure by the commissioner under the order, of all of its California assets. On June 1, petitioner filed its petition in this court for a writ directing the superior court to vacate its order. Respondents demurred to the petition on the ground that it does not state a cause of action against them and also filed returns. Later petitioner filed a supplement to the petition and then an amendment thereto. Respondents filed demurrers and answers to the petition and to the supplement and amendment. The case was submitted on the pleadings and the briefs, it being the petitioner's theory that the pleadings, together with certain admissions claimed to be made in the briefs and on the argument, show as matter of law that the commissioner had no legal right to seize the company as he did.

Pleadings.

The material allegations of the complaint as supplemented and amended may be summarized as follows:

Petitioner was organized under the law of Rhode Island, is lawfully doing business in 34 states, a number of foreign countries and territories, and has been duly licensed to do business in California since 1912. Wallace Downey is the duly appointed Insurance Commissioner of California.

As of December 31, 1948, petitioner's total assets exceeded the total liabilities (excluding capital and surplus) by about $2,500,000.00. After deducting certain non-admitted assets, there was still a capital stock of $1,000,000.00 and a surplus of over $1,000,000.00. During 1948, petitioner wrote insurance in gross premium value of about $13,000.000.00, and about $1,500,000.00 in California alone. Business in California has shown a healthy increase. Petitioner has 142,000 policies in force in the state, and is represented by over 2,500 duly qualified and licensed agents.

The superior court order appointed the commissioner conservator of petitioner's business, gave him title to its assets "wheresoever situated," and restrained petitioner from carrying on its business. The commissioner, on taking over, has prohibited the issuance of any further policies in California, and, in effect, has stopped petitioner from doing business here.

The grounds given by the commissioner in his application are all disputed by petitioner, and it is contended that for more than a year most of them were known to him. They rest on the determination of legal questions, accounting problems, questions of valuation of assets, and similar questions, all of which are debatable. On many of these issues the commissioner has a difference of opinion with 33 other state insurance commissioners. The only recent development is in connection with an agreement between petitioner and Pioneer Equitable Insurance Company of Indiana, dated March 21, 1949. This agreement was approved in March by the Insurance Commissioner of the State of Rhode Island, petitioner's domiciliary state, and the Insurance Commissioner of the State of Indiana, Pioneer's domiciliary state.

The commissioner's interpretation of that agreement is that (a) it amounted to a merger or consolidation without the commissioner's consent (the company denies that it does or that the commissioner's consent can be required); and (b) it would cause a properly adjusted financial statement to show the company's capital impaired approximately 73 per cent. This causes a technical statutory insolvency, and is based on determinations opposed to those of the insurance commissioners of the domiciliary and other states. The commissioner concedes that there is an excess of assets over true liabilities, so that no actual insolvency exists. The liability of petitioner to Pioneer as of January 1, 1949, for the retirement of preferred stock in the amount of $1,500,000 is by a resolution of the stockholders of Pioneer held March 29, 1949, made subordinate to the rights of the policyholders, creditors and claimants, and if petitioner shall be in arrears in providing for the redemption of the Class A preferred stock in an amount equivalent to two years cumulative redemptions, the stockholders of Class A preferred stock voting as a class shall be entitled to elect a majority of the directors of the corporation.

From August, 1948 on, the commissioner had conferences with officers and attorneys of petitioner regarding matters of internal management, making various complaints about the management and asking the company to withdraw from business in California. Further conferences were held.

Although petitioner did not believe the commissioner had power to demand internal changes, it made several of the requested changes—put in directors who were not employees, cut down the volume of its business, adopted a policy of investing only in securities traded on a national exchange, etc. Petitioner did not remove Stewart Hopps, chairman of the board, from his position as officer and director, as suggested by the commissioner, but transferred power from the chairman of the board to the president. The commissioner, although not contending he had the right to insist on such change, still insisted Hopps should be eliminated entirely.

Early in November, 1948, the commissioner met in New York with the insurance commissioners of Rhode Island, Pennsylvania and Indiana, and some officers of petitioner. This was followed by a meeting of the insurance commissioners alone, who took no action nor did any of the commissioners in other states.

On November 8, petitioner received a letter from the commissioner purporting to require it to cease business in California. Under authority given in the Insurance Code, petitioner asked the Attorney General of California for an opinion as to the legality of the commissioner's order in the November 8, letter, and was later advised that the commissioner's order had been withdrawn. On November 18, petitioner filed in the superior court an application for declaratory relief against the commissioner, seeking an adjudication of status and legal relations under the Insurance Code, and an injunction restraining the commissioner from interfering with the company's business pending final adjudication. An order to show cause for a preliminary restraining order issued November 18, returnable November 26. It was continued from time to time by mutual consent, and was to be heard on June 13, 1949.

Immediately after the declaratory relief action had been filed by petitioner, the commissioner, under authority of the Insurance Code, began investigating petitioner. Hearings were held in New York and petitioner's books were examined in Philadelphia. Hearings were adjourned on December 23, for the Christmas holidays, on the understanding that they would be resumed again on notice from the commissioner. On February 23d, the Attorney General of California wrote petitioner about completing questioning of officers. The company replied that they would be available in about one week. The attorney general made no objection and was to notify petitioner of the date. No further word was received from the attorney general or the commissioner, and no further request for resumption of the investigation was ever received by petitioner.

The National Association of Insurance Commissioners is an organization of all state insurance commissioners, having as one purpose to secure uniformity of insurance regulation among the states. At the convention of the N. A. I. C. in New York in December, 1948, the commissioner made a motion that the executive committee, of which he was a member, act together in the matter of petitioner. The motion was not seconded. On January 17, 1949, the commissioner advised the N. A. I. C. that he did not desire to act alone and requested the N. A. I. C. to join in uniform action. The commissioner was thereafter advised that the N. A. I. C. suggested a "convention examination," conducted by examiners from state insurance departments, one examiner from each zone in which the company does business. For the purpose of these examinations, the United States is divided into six zones. Such examinations are made of all insurance companies as often as required by the law of the domiciliary state. Rhode Island requires such an audit every four years. The last examination of petitioner was in 1945. California is in zone 6, and the commissioner accepted the invitation to be the examiner representative of that zone.

The convention examination and audit of petitioner began on May 2, 1949. On May 10th, the commissioner notified the convention examiners that he would advise regarding his participation at the earliest moment. To date no representative of the commissioner has appeared to participate in the audit, although it has been going on for a month by the representatives of the other five zones, and will be finished in about 90 days.

On May 17th, one week after the commissioner communicated with the convention examiners, the commissioner filed his application for a conservator. The commissioner stated to the trial judge that application had to be made ex parte because if notification were given, petitioner would have a chance to withdraw all of its assets from California, and that petitioner's agent in California would pay it money due for premiums.

As an example of the determinations from which the commissioner drew a conclusion of hazardous condition of the company the report (Exhibit A) questioned a receivable due petitioner from the U. S. Interstate Brokerage Corporation in the sum of $923,761.45 as of September 30, 1948, although as of December 31, 1948, the date given to the audit, said receivable had been reduced to $139,873.89 and to $24,039.19 at the date of the seizure, and the commissioner knew or should have known these facts. In writing off a reinsurance commission receivable from Lloyds on the reinsurance contract petitioner claimed it should be based upon a 25 per cent commission, whereas, for the reasons there set forth, the commission basis should have been 44.6 per cent. The write-down by the commissioner was $616,589.79 when it should have been only $53,351, and the commissioner acted arbitrarily and unreasonably in making such write-down.

At the time of filing his application, the commissioner knew (a) that petitioner's agent in California forwards premiums to petitioner monthly, as they are collected from subagencies; (b) that on May 17th, the agent held only about $45,000 due petitioner; (c) that premiums receivable for the 60–90 day period preceding May 17th were in an amount less than $200,000, and that only 50 per cent or less of that would be paid agents, due to a notice sent by the commissioner to all agents and brokers; (d) that the commissioner would come into possession of only $145,000 or less, and that petitioner has little or no other assets in California; (e) that the assets to be received by him "were at least $300,000 less than the amount required to pay the normal losses on insurance in force, without taking into consideration any provision for return premiums on policies which would be cancelled as a result of the commissioner's action and also without taking into consideration the expenses of his administration. Of $1,300,000 unearned premium reserve on California insurance in force at least $450,000 would be paid out in losses in the normal course."

The commissioner's determination that continuation of business in California would be hazardous is highly debatable and in conflict with the determination of 33 insurance commissioners and convention examiners from Florida and Rhode Island who have signed affidavits that they do not believe the company to be on the verge of insolvency. The commissioner, on May 17th, notified the 2,500 agents of the company and Pioneer Equitable, and all brokers, about 7,500 in number, that he was taking the company over in this state; that no further business was to be written with the company, and that he was going to audit all accounts of agents and brokers. Petitioner is ready, willing and able to pay all losses for which it is now liable to residents in California, and to pay the return premiums on any policies cancelled by residents, but is prevented from so doing by the commissioner and the court's action. The commissioner, owing to the fact that the main assets of petitioner are in Rhode Island, cannot rehabilitate it in this state; he can only liquidate, or force it to discontinue business here. The seizure has caused petitioner irreparable injury.

Attached to the petition for a writ of mandate is the application of the commissioner for the superior court order appointing him conservator, which had attached to it Exhibit A, which is a report or audit of petitioner dated April 22, 1949, made by the commissioner's auditor, purporting to show the condition of petitioner as of December 31, 1948, and which is the basis upon which the commissioner claims his right to act. This audit shows petitioner to be insolvent within the meaning of article 13, chapter 1, part 2, division 1 of the Insurance Code.

Respondents' answer denied the allegations of the petitioner as to the action of the commissioner being arbitrary, unreasonable, and in abuse of his discretion, or that he had knowledge of the matters which petitioner claims differs from those shown in the audit.

Contentions.

Petitioner's principal contentions are (1) that the circumstances as known to the commissioner on May 17th did not justify a seizure of petitioner in California, without a previous hearing, and therefore the commissioner acted arbitrarily in so doing; it denies the correctness of the report and contends that neither the report nor the circumstances known to the commissioner justified a seizure without a preliminary court hearing; and (2) that because it claims that petitioner has no adequate remedy to show that the seizure was arbitrary, not made in good faith, and unnecessary, the statute permitting such seizure is unconstitutional, or if constitutional, has been applied in an unconstitutional manner; that while the question of petitioner's condition is being threshed out in court, it should be permitted to possess and operate its business.

Urgent Emergency.

[1] Petitioner contends that section 1011 authorizes the court to make the conservator order without notice *only* in situations of urgent emergency. There is nothing in the section which justifies this interpretation. The section provides: "The superior court * * * shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order [similar to the one made in this case] * * *. (c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is due to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person. (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public * * *. (j) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this Code."[1]

[2] This contention is closely related to its argument that because the commissioner was aware of most of the matters complained of some time back he should not have used the procedure provided by the statute, without a hearing either before the commissioner or the court. Similar contentions have been heretofore considered by the courts and denied. In Caminetti v. State Mutual Life Ins. Co., 52 Cal.App.2d 321, at pages 325–326, 126 P.2d 165, at page 168, the court said: "Appellant presents the further argument that the state is estopped from taking over this insurance company because the commissioner and his predecessors in office knew of the practices which the commissioner determined, and the court in this proceeding concluded, to be hazardous; that, knowing of these practices in years gone by, the commissioner failed to take over the company and permitted it to continue its business.

"To state the contention is to state its impossibility. To govern themselves, the people act through their instrumentality which we call the State of California. The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before."

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[1] It may be noted here that petitioner is making no point of the failure of the commissioner to comply with section 1038 which provides that any application under section 1011 "shall be served upon the person named in such application in the manner prescribed by law for personal service of summons * *." —probably because Neblett v. Pacific Mutual Life Ins. Co., 22 Cal.2d 393, 139 P.2d 934, holds that notice is not essential.

The statute itself does not limit its use to times of sudden emergency. The statute, as construed by the California courts, requires only that the commissioner file a verified application stating that he has found one, or more, of the statutory grounds to exist. "In making his application under section 1011 of the Insurance Code, *the commissioner does not seek a judicial appointment and a judicial ruling that the company is in fact delinquent.* By his application the commissioner merely represents that he has found certain conditions to exist and has made his official administrative determination to proceed as authorized by the statute. In obtaining ex parte order, *the commissioner is not required to show* to the court *that the company was in fact in a hazardous condition,* but only that he, as a state officer, invested by legislative authority with the power, has so 'determined' and 'found'. The insurance code provides that the order or determination of the Commissioner to take over the affairs and assets of the company shall continue in force and effect until, upon application by either the commissioner or of the company, it shall appear to the court, after a full hearing, that the ground for said order does not exist or has been removed and that the company can properly resume title to and possession of its property and the conduct of its business." Caminetti v Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 487, 139 P.2d 681, 687; emphasis added. Under section 1011 nothing is required beyond the good faith determination by the commissioner of the existence of one of the conditions enumerated in the section.

[3] Petitioner has emphasized that the matters involved were indisputable. It is not a requirement of the statute, however, that such matters not be disputable. The Legislature undoubtedly assumed that in most cases the company involved would dispute the commissioner's contentions, and accordingly provided, in section 1012, for a full hearing before the trial court, at which the company could show that the conditions claimed by the commissioner did not exist. There is no implied restriction in the statute that the commissioner act only where the existence of the dangerous condion is beyond dispute.

That the company's contention that an emergency must exist is not well founded is further shown by the provisions of section 1013 of the Insurance Code, which provides for a seizure by the commissioner without any hearing or any court order. It reads: "Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. * * *"

Section 1012 provides for a hearing in case of seizure either under section 1011 or 1013: "Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

In Caminetti v. Guaranty Union Life Ins. Co., 52 Cal.App.2d 330, 126 P.2d 159, the court discusses the term "hazardous" as used in section 1011(d) and holds that even though an insurance company can be solvent its condition may still be hazardous and justify the seizure by the commissioner. The court said, 52 Cal.App.2d at page 332, 126 P.2d at page 162: "The company was solvent; it had grown under the family management; but the commissioner determined, and the court approved his determination, that the withdrawal from the funds of the mutual policyholders of these monthly salaries made it hazardous for it to continue in business. * * *

"Did the withdrawal of these funds constitute a hazardous condition as defined by the Insurance Code? To follow to its conclusion appellant's argument that there could be no hazard to policyholders so long as the business is solvent, would be to sanction the withdrawal of policyholders' money in the payment of excessive salaries without restriction. This is not the law. Excessive withdrawal of policyholders' funds continued long enough will eventually render any company insolvent, and thus destroy the very purpose of the payment of insurance premiums. The people of the state and interested policyholders have a vital interest in this. *There is no requirement of our Insurance Code that the insurance commissioner must wait until an insurance company is insolvent* before he takes action to protect the policyholders. To so hold would be to apply the ancient aphorism about locking the barn door after the horse is stolen. * * *

"* * * If the management of the insurance company so conducts its business that there is loss, *or risk of loss* to the policyholders, it becomes the duty of the insurance commissioner to take possession of the company's assets and to conduct its business as conservator. This is the meaning of the word 'hazardous' as used in the statute." 52 Cal.App.2d at page 333, 126 P.2d at page 163; emphasis added.

[4, 5] Petitioner contends that because the company was in a position "to make available within a reasonable time sufficient moneys to meet promptly any demand which might in the ordinary course of events be properly made against" it, Insurance Code, § 706.5, the commissioner was not entitled to proceed under section 1011. However, under the Insurance Code a company may be in that position and yet be insolvent. Such was the situation in Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761. It must be remembered that insurance companies, like banks and building and loan companies, are charged with a public interest, and hence, the price of doing business is the fact that whenever a condition exists which the insurance commissioner feels is hazardous, he may take over the company and the question of whether he was justified in doing so is thereafter threshed out. "It is no longer open to question that the business of insurance is affected with a public interest. The state has an important and vital interest in the liquidation or reorganization of such a business. [Citing cases.] Neither the company nor a policyholder has the inviolate rights that characterize private contracts. * * * Section 1010 et seq. of the Insurance Code deal with rehabilitation and liquidation of insurance companies in financial difficulties, and with the reinsurance of their business. This phase of state control is extremely important. Insurance is a public asset, a basis of credit, and a vital factor in business activity. Obviously, if an insurance company gets into financial difficulties something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated. The public has a grave and important interest in preserving the business if that is possible. Liquidation is the last resort." 10 Cal.2d at page 329, 74 P.2d at page 774.

In Andre v. Beha, 1925, 211 App.Div. 380, 208 N.Y.S. 65, the New York superintendent of insurance had taken over the assets of a Russian insurance company. Plaintiff there made the same contentions of irreparable loss and injury as are made here, and also the contention that the company was actually solvent. In refusing plaintiff's application for relief the court said, page 79 of 208 N.Y.S.: "The Attorney General, in his first point, argues that the proper procedure in this case calls for action on the part of the superintendent of insurance under section 63 of the Insurance Law (see McKinney's Consol. Laws and Supp. [c. 28]), which, he says, provides an exclusive remedy for the protection of the corporation and its shareholders. The plaintiff claims that this section has no application to a solvent company, which, he says, is the case here. I cannot agree with the learned counsel for the plaintiff in his narrow view of the section. It is not only insolvency that is made the basis for action on the part of the superintendent but under the section he may act where the company is found, after an examination to be in such a condition that 'its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public.' See Insurance Law, § 63 * * *.

"In construing this very section of the law, the Court of Appeals in a recent case (Matter of City Equitable Fire Ins. Co., 238 N.Y. 147, at page 156, 144 N.E. 484, 486) said:

"'The superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States, but for the interest of all its policyholders, creditors, and stockholders wherever they may be.'"

Petitioner has cited, and we have found, no case involving insurance companies, banks, or building and loan companies, affected, as they are, with a public interest, supporting the position it takes with reference (1) to necessity for urgent emergency; (2) abuse of discretion in selecting the remedy under similar circumstances; (3) or requirement for hearing before seizure.

[6] Petitioner refers to the insolvency as a "technical" one. The code has defined "insolvency." It has fixed the 75 per cent figure as a minimum figure below which it is dangerous for a company to go. The impairment of capital shown in Exhibit A is approximately 73 per cent. Section 981 of the Insurance Code provides that when the impairment (as defined therein) falls below 75 per cent of the aggregate par value of its issued stock, an insurance company is insolvent. Thus, the apparent impairment amounts to approximately 48.5 per cent of petitioner's stock par value. It is therefore considerably below what the state has determined to be a safe point. Coupled with the fact that the company appears to have been losing over $1,000,000 per year for the past three years, and has changed in that time from a company with ample capital and surplus to one having no surplus and an impaired capital,[2] it cannot be held to be strictly a technical situation. In North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221, the court rejected a similar contention concerning the impaired capital of a building and loan association. There the statute allowed taking over, if the commissioner found that capital was impaired *to any extent,* and the court rejected the argument that this was a mere "technical impairment," not sufficient ground for a seizure (an argument made in this case by petitioner): "This language is so plain and clear that any attempt to interpret it would be almost an absurdity. It is apparent that the Legislature intended by this provision that if any impairment whatever existed, the commissioner might in his discretion take over the business, property, and assets of the association showing such impairment." 6 Cal.2d at page 98, 56 P.2d at page 1224.

Statute Applies to Foreign Corporations.

[7] Petitioner argues that section 1011 of the Insurance Code should be construed as not applying to foreign corporations This argument is untenable. Article 14 o the Insurance Code, dealing with proceedings in cases of insolvency and delinquency, contains sections 1010 to 1062 inclusive. Article 14 begins with section 1010 which

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[2] Wherever in this opinion we have referred to the financial condition and conduct of the business of the company, we are referring merely to the situation as it appears in the report and are not holding that such situation actually exists. To determine that fact will require a long hearing, for which the superior court, in proceedings under section 1012, is better equipped than this court.

provides as follows: "The provisions of this article shall apply to all persons subject to examination by the commissioner, or purporting to do insurance business in this State, or in the process of organization with intent to do such business therein, or from whom the commissioner's certificate of authority is required for the transaction of business, or whose certificate of authority is revoked or suspended." Petitioner admittedly is doing business in this state and subject to examination by the commissioner and required to obtain a certificate. The entire article, including section 1011, is applicable to persons in the enumerated, independent categories. There is no requirement that corporations be domiciled in Califorina. Moreover, prior to 1931, proceedings against foreign insurance corporations were provided for in sections 5, 6, Statute 1919, chapter 178, page 265, while those against California corporations were provided for in section 2. In that year the provisions were combined by amendment of section 2 and repeal of section 5. See Stats. 1931, ch. 1123, p. 2375. These provisions in 1935 were codified in the Insurance Code in sections 1018 to 1022, Stats. 1935, ch. 145, p. 553. Thus, petitioner is within the intended scope of the statute. The original sections required a proceeding under order to show cause, but in the codification in 1935, this requirement was eliminated.

Due Process.

[8] Section 1012 provides for a hearing, after seizure by the commissioner, either under section 1011 or 1013. Although the requirements of due process often involve a prior full hearing, it has long been recognized that where public necessity requires, there can be action *followed* by a hearing. Familiar examples include the right to examine cattle for tuberculosis, slaughtering those found diseased, Affonso Bros. v. Brock, 29 Cal.App.2d 26, 84 P.2d 515, the power to seize vehicles carrying narcotics, Health and Safety Code, § 11611, and other situations where the public welfare requires prompt action.

[9] The same principles have consistently been applied to institutions dealing with the financial affairs of the public. In the early case of State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, 756, L.R.A.1915E, 675, the state superintendent of banks had seized a bank under a statute providing as follows: "Whenever the superintendent of banks shall have reason to conclude that any bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue business, the superintendent of banks may forthwith take possession of the property and business of such bank, and retain such possession until such bank shall resume business, or its affairs be finally liquidated, as herein provided." (The act also provided for an injunction proceeding to determine the merits, *after* seizure. Application for such an injunction had to be made within ten days.) It will be noted that a really "summary" procedure was involved, since there was not even an application for a court order.

The California Supreme Court considered all possible constitutional arguments and held the legislation, and action thereunder, not violative of any constitutional right: "The state owes to the public the duty not only of providing for supervision and examination of banks, but the added duty as a matter of public policy, if the conditions warrant, of summarily closing them up and terminating their existence. When the management thereof has brought them into a condition of unsafety or insolvency, the public interest demands that on this condition being ascertained they should not be permitted to further hold themselves out as responsible institutions or be permitted to remain in a position to do so. * * *

"In this view it cannot be said that initial seizure is not a fair and reasonable measure to be adopted to effect the protection of the public welfare which is designed by it, and, as the only limitation on the power of the state imposed under the constitutional amendment is that the regulations it makes shall be of that character, no constitutional right of the appellant has been impaired by such legislation.

"Nor is the due process of law clause violated because such summary seizure is authorized to be made without action brought and judicial warrant for the taking. Due process of law does not necessarily imply a regular proceeding in a court of justice or after the manner of such courts. * * *

"* * * While the initial seizure is authorized under the act without suit brought and is justified as a matter of public policy for the reasons here given, it cannot be said that the bank is thereby deprived of its property without due process of law as heretofore defined. An opportunity is given the alleged delinquent bank to invoke the aid of a court of competent jurisdiction as to the validity of the seizure and right of the superintendent to hold the property; and, if that opportunity is a reasonable one, then the right which the Constitution guarantees has been in substance preserved to it." 165 Cal. at pages 446, 448, 132 P. at page 759.

The United States Supreme Court affirmed the holding by a *per curiam* decision. 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488.

In North American Building & Loan Ass'n v. Richardson, supra, 6 Cal.2d 90, 56 P.2d 1221, the court held constitutional similar action, under a similar statute dealing with building and loan associations.

The legality of the Insurance Code was considered in a number of cases involving the Pacific Mutual Life Insurance Company. The California Supreme Court held that even though a court order might have been void, through disqualification of the judge, the action of the commissioner could be upheld under the summary seizure provisions, § 1013 of the code, and that such provisions were legal: "Section 1013 of that Code confers on the commissioner, whenever it shall appear to him that any insurance company is in such condition that its further transaction of business will be hazardous to its policyholders or creditors, the power to take summary possession 'without notice and before applying to the court for any order.' Similar provisions for summary seizure exist in the Bank Act and Building and Loan Act. These sections have uniformly been sustained against the claim of illegal seizure. State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915 E, 675; North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221." Carpenter v. Pacific Mutual Life Ins. Co., supra, 10 Cal.2d 307, 324, 74 P. 2d 761, 772. See, also, Holabird v. Richardson, 3 Cal.2d 299, 44 P.2d 530, sustaining a summary seizure under the building and loan statute.

On appeal to the United States Supreme Court, it was held that questions concerning the validity of the seizure and whether it was valid by ratification or by the summary seizure provisions "concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment." Neblett v. Carpenter, 305 U.S. 297, 302, 59 S.Ct. 170, 173, 83 L.Ed. 182.

It is not surprising that the Supreme Court found no due process issue, since it had approved a similar procedure, by *per curiam* opinion, 25 years earlier. State Savings & Commercial Bank v. Anderson, supra, 238 U.S. 611, 35 S.Ct. 792, 59 L. Ed. 1488. Following the Neblett case it has been assumed that the validity of the Insurance Code was beyond doubt, with respect to the provisions for summary seizure, and, *a fortiori*, seizure *with* court order. Thus in Caminetti v. State Mutual Life Ins. Co., supra, 52 Cal.App.2d 321, at page 325, 126 P.2d 165, at page 168, the court said: "There is no merit in the further contentions presented on this appeal: that the application of the commissioner for the ex parte order is deficient; that the court was without jurisdiction to make the order; and that the proceeding as a whole is based upon an unconstitutional statute. They are all covered by and disposed of, either directly or by analogy, in the Pacific Mutual cases [supra]."

In Title Guaranty & Surety Co. v. State of Idaho, 240 U.S. 136, 36 S.Ct. 345, 60 L.Ed. 566, contentions similar to those made in this case were made concerning the seizure by the superintendent of banks of an Idaho bank. The banking act was challenged as unconstitutional. The court held, 240 U.S. at page 141, 36 S.Ct. at page 346: "But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the Fourteenth Amendment because power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. [Citing cases.]"

[10] Petitioner contends that to make the application of statutes providing for summary seizure constitutional there must be a reasonable necessity for taking, coupled with an adequate remedy giving the company whose assets are seized the right to show that the seizure was unnecessary and unjustified. There was such a situation here. In spite of the vehement assertions of petitioner that section 1012 does not provide an adequate remedy, such remedy is similar (except that there the company is required to take advantage of the remedy within thirty days of the seizure) to that provided in section 13.12 of the Building and Loan Act, Gen.Laws, Act 986, for seizures by the building and loan commissioner, which the court in North American Building & Loan Ass'n v. Richardson, supra, 6 Cal.2d 90, at page 102, 56 P.2d 1221, at page 1226, held constituted full protection from "any arbitrary and unjust seizure." The only difference between the court proceeding established by section 13.12 of the Building and Loan Act and that established by section 1012 of the Insurance Code is that in the former the building and loan commissioner may be required to show cause why further proceedings should not be enjoined, while in the latter there is a hearing without such order. In either event, the seizure by the particular commissioner continues until after a complete hearing of the matter. Section 13.12 says that after "hearing the allegations and proofs of the parties and determining the facts, [the court] may upon the merits * * * enjoin the commissioner from further proceedings and direct him to surrender" etc. Section 1012 says that the order of seizure continues until upon the application of either party "it shall, after a full hearing, appear to said court that the ground" for the seizure does not exist.

Application of the Statute to a Foreign Corporation Does Not Render It Unconstitutional

(a) *Extraterritoriality:*

[11, 12] Petitioner argues that if the statute applies to foreign corporations it attempts to exercise power over assets not in the state, and calls attention to the broad language in the order concerning vesting title to all of the assets of petitioner, "wheresoever situated." It argues that this must refer to assets outside of the state and that the court lacks power to change title to such property. Admitting the lack of power in California courts to transfer title to assets outside of the state, there are two answers to the contention: (1) Petitioner has not alleged that the state is attempting to transfer title to out of state assets, and therefore has no standing to complain. (2) The statute can reasonably be construed as valid, the phrase "wheresoever situated" meaning within the state where the court has power to act.

A similar point was involved in Franklin v. Peterson, 87 Cal.App.2d 727, 197 P.2d 788, involving the validity of a municipal ordinance imposing a license for revenue purposes upon an attorney at law. There the appellant contended that the terms of the ordinance were broad enough to include persons outside the municipality. The court said: "It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the constitution, but to make a valid statute or ordinance within the scope of its constitutional powers. Read in the light of this rule, the ordinance here in question must be held as intended to operate only upon those subject to the jurisdiction of the City of Los Angeles.

"Furthermore, a court will ordinarily inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration. In the case at bar the stipulated facts show that appellant maintains a law office within the City of Los Angeles and carries on his law practice there. The construction given the ordinance by appellant would not, therefore, work any injustice upon him or violate his rights. He is therefore confronted with the general rule that one cannot complain of a possible illegal application of an ordinance if he himself is not a party thereby aggrieved." 87 Cal.App.2d at page 730, 197 P.2d at page 790.

There are cases from other states in which the taking over by a state official of the assets of a foreign insurance company has been upheld. See People ex rel. Potts v. Continental Beneficial Ass'n, 289 Ill. 40, 124 N.E. 352, and cases cited therein.

(b) *Unreasonable burden on interstate commerce*:

[13, 14] Petitioner argues that insurance has been held to be interstate commerce, and that the regulations in the Insurance Code, particularly, that allowing seizure if a foreign corporation enters into a merger, etc., without consent of the California commissioner, constitute an unreasonable burden on interstate commerce. In the case of United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, it was held that for the purposes of the Sherman Anti-Trust law, 15 U.S.C.A. § 1 et seq., insurance was "commerce" and in that case, interstate commerce. In making this holding, however, the court specifically denied that all state regulation of insurance must be found invalid. "Another reason advanced to support the result of the cases which follow Paul v. Virginia [8 Wall. 168, 75 U.S. 168, 19 L.Ed. 357,] has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. * * * And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid." 322 U.S. at page 547, 64 S.Ct. at page 1170.

To avoid any ambiguity which might still exist, the "McCarran Act" was passed shortly thereafter by Congress, declaring that "the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 59 Stats. pp. 33, 34, 15 U.S.C.A. §§ 1011, 1012.

Following the South-Eastern case, there were a number of cases (in some of which the acts occurred prior to passage of the McCarran Act) in which insurance companies argued that state regulatory provisions previously valid had become invalid as unreasonable burdens on interstate commerce, when applied to foreign corporations. The cases are annotated at 164 American Law Reports, page 500. In all the cases there discussed, including two Supreme Court decisions, the state taxes and regulations were upheld.

In Robertson v. California, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366, the court held valid sections of the Insurance Code which in effect allowed the state to exclude a foreign insurance company or its agents from doing business within California if the company failed to meet California's reserve requirements. Without relying on the McCarran Act, the court answered the argument about interstate commerce as follows: "It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result." 328 U.S. at page 459, 66 S.Ct. at page 1170.

The Court also stressed the fact that the statute did not *discriminate* against interstate commerce, but required only that foreign corporations meet the same requirements as domestic insurers. 328 U.S. at page 461, 66 S.Ct. at page 1171. The above reasoning is applicable to the present case. The provision allowing seizure by the commissioner applies equally to domestic or foreign corporations and is not discriminatory. Furthermore, it affects the sound financial condition of the company, and is therefore related to doing business in California.

Petitioner argues with reference to subdivision (c) of section 1011, that it would be burdensome, practically, to get the permission of all 48 commissioners to such a transfer of assets, if the company were doing business in all states. It is difficult to see why that would be more burdensome that submitting to examination in every state where the company does business, as the price of doing business in such state. Petitioner has cited no case in which state regulation of insurance, as applied to foreign corporations, has been held an unreasonable burden on interstate commerce, and as shown, there are numerous cases to the contrary.

Was the Commissioner Arbitrary in the Selection of the Remedy?

[15] Petitioner contends that the commissioner was arbitrary in his selection of the remedy for the conditions shown in the audit. The audit shows the capital to be reduced approximately 73 per cent of the aggregate par value of its issued capital stock. The result of the seizure, it is argued, is that the commissioner cannot rehabilitate or reorganize a foreign corporation whose main assets are outside this state, but only liquidate the company, and therefore, such a seizure is too heroic for a condition which it describes as "technical insolvency." The application and its exhibit show that there were, among others, three conditions upon which the application was made: (1) a "merger" of petitioner and the Pioneer Equitable Insurance Company without the commissioner's consent; (2) conditions hazardous to the policyholders and the public; (3) insolvency.

Petitioner contends that the commissioner had other powers and remedies which were equally effective and less drastic than the remedy provided by section 1011, and hence it was arbitrary of him to select the latter method.

People v. One 1941 Chrysler Sedan, 81 Cal.App.2d 18, 183 P.2d 368, cited by petitioner, dealt with an entirely different set of facts. There, this court held that where there are alternative methods of giving notice under constructive service, a complainant may not select one which he knows will not notify the other party when he also knows that one of the alternatives, if selected, would notify him. Here, even though we might find that other remedies were open to the commissioner, we are required to go one step further and find that *as matter of law* the commissioner was arbitrary in proceeding as he did, instead of using another method. Under the circumstances of this case, we do not feel we can do so.

[16, 17] The other remedies suggested will be taken up seriatim. (1) Section 12928.6 of the Insurance Code provides that "Whenever the commissioner believes, from evidence satisfactory to him, that any person is violating or about to violate any provisions of this code or any order or requirement of the commissioner issued or promulgated pursuant to authority expressly granted the commissioner by any provision of this code or by law, the commissioner may bring an action" in the superior court for an injunction enjoining the continuance of such violation, etc. To hold that he should have used this remedy, or any of the others suggested and hereafter set forth, instead of the one he did use, means that we must hold, as matter of law, that during the long delay in which all the complicated matters would have to be heard or litigated in order to determine the correctness of the matters stated in the audit, the operation and affairs of the company should be in its hands instead of those of the commissioner. However, it appears from the decision in Caminetti v. Imperial Mut. Life Ins. Co., supra, 59 Cal.App.2d 476, 139 P.2d 681, and from an examination of the Insurance Code, that it is the policy of the law in this state that whenever the commissioner deems the condition of a company hazardous, he should take over the company while these matters are being threshed out, rather than take the chance that, should the statements in the audit prove to be true, and the company in the meantime continue to take on new policyholders, great loss would result to them, as well as to the original policyholders. An examination of section 12928.6 shows that it is not broad enough to cover the situation disclosed in the audit. It is directed primarily to the stopping of certain acts occurring in this state, rather than to a situation which requires restoration of capital, or to acts occurring outside the state, where a California injunction could not apply. Moreover, an injunction complaint alleging the matters charged in the commissioner's application in this case, would have most of the serious effects on petitioner's business which it charges occurred as a result of the seizure here. (2) Section 700 of the Insurance Code provides for an administrative hearing under the provisions of the State Administrative Procedure Act, Government Code, § 11500 et seq. (3) General less drastic steps. This is rather an indefinite suggestion. (4) The commissioner's Bulletin 50 sets up a procedure by which the report of the examination staff is to be sent to the company involved, giving it 10 days to file objections thereto. These rules primarily are for intradepartmental regulation and do not necessarily require that this proceeding be taken before court proceedings are started. (5) Section 706.5 of the Insurance Code provides that the commissioner, whenever "in his judgment, the investments of such insurer are not so made as to make available within a reasonable time sufficient moneys to meet promptly any demand which might in the ordinary course of events be properly made against the insurer" may "order such insurer to cease to effect new contracts of insurance until its financial circumstances are changed sufficiently to remove such condition" and may suspend or revoke the certificate of authority of the insurer if he fails to comply with such order. This remedy would probably result in most of the evils which petitioner complains of here, injury to the company's reputation, surrender of policies, and loss of its agents, brokers, etc. (6) A notice to petitioner to make good within a limited time the deficiency in its capital followed by a proceeding under section 12928.6, (1) above. (7) Section 704 of the Insurance Code provides a method

for the suspension of the certificate of authority of the company. (8) The general power appearing throughout the Insurance Code to revoke, cancel or suspend certificates of authority. Just how the effects of proceeding under either (7) or (8) would be less drastic from the company's standpoint than the procedure taken does not appear. Any suspension of the right to do business in California would bring about the same injury to the company as occurred here, without a corresponding protection to the policyholders in the safeguarding of its assets, small as those assets are.

Taking all the alternative methods suggested by petitioner, they either are practically as drastic as the one used, and therefore would be as injurious to petitioner, or they do not provide the protection to the policyholders and the public which the situation disclosed by the audit could have required.

[18] Petitioner contends that the controversy should have been determined in the declaratory relief action instead of under section 1011. That action was started by petitioner. The commissioner's failure to join issue in it has been acquiesced in by petitioner. While the condition of the company could have been ascertained by hearings in that case, the fact that it existed did not bar the commissioner from proceeding as he did. It, also, was subject to the objection that the interests of the public could not be fully protected by a proceeding which did not give the commissioner the control of the company's assets.

[19, 20] The test to be applied to the action of the commissioner is, was the selection arbitrary as matter of law? Many of the proposed remedies would have been as disastrous to the petitioner as it claims is the one chosen. But the prime consideration is the protection of not only the policyholders of the company but also the public. The matters set forth in the audit are serious. They show that the company has been losing over $1,000,000 a year for the last three years. The time required to have a complete hearing of the truth of these charges (which petitioner says is debatable) would be very great. If they are true, it is probably that long before a hearing could be concluded, unless petitioner repaired its capital and changed its practice in the meantime, the company would be in such a condition as to place its new, as well as old, policyholders in a precarious situation. The refusal of the insurance commissioners of 33 states to join with the commissioner in action against petitioner; the commissioner's refusal to join in the convention audit, or to await its outcome; the fact that the commissioner had known of much of petitioner's situation for the past year; and the other matters stressed by petitioner, do not overcome the fact that when he received the audit and saw the actual hazardous situation of the company as of December 31, he was justified in taking immediate action. The law contemplates that when that danger exists (even though it may not be immediate) the commissioner may use his judgment as to which remedy to select. If we assume, as we must from the face of the audit, that the condition of the company was hazardous and insolvent (even though the results of that condition would not be felt immediately), the commissioner selected the best remedy. It would be a breach of his duty to the public to permit the company to go on writing business.

Merger.

Section 1011 of the Insurance Code permits seizure where the insurance company has "entered into any transaction the effect of which is to merge, consolidate, or reinsure" etc., without first obtaining the commissioner's consent. It is unnecessary for us to determine whether the transaction with Pioneer was a merger under this section, or, if so, whether the law can constitutionally require a foreign corporation to obtain consent of the California commissioner. The commissioner is making no claim of the illegality of that transaction. While he refers to it as a "merger" and we have used the word herein, it is without any legal signification. We are concerned with the effect on the finances of the company of the commitments made in the agreement.

Admitted Facts Do Not Establish Abuse of Discretion.

[21–23] To entitle petitioner to the relief sought here, we must find from the admitted facts that the commissioner, as a matter of law, abused his discretion and that the taking was arbitrary. This court is not equipped to pass upon the truth of the matters set forth in the report or the charges made by petitioner where a conflict as to those matters exists. To determine such matters would require a hearing as long and as involved as one under section 1012. Mandamus is to be resorted to only when the usual and ordinary forms of remedy are insufficient to afford redress. The code itself provides that the writ shall be issued "in all cases where there is *not* a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ. Proc., § 1086; emphasis added. The writ may issue only when it is evident that the law has provided no other sufficient remedy. Here the remedy granted by the statute is not only equally as convenient, beneficial and effective as mandamus, but is far more convenient and effective. The trial court is far better equipped to pass on the controverted fact questions than this court. (16 Cal.Jur., §§ 17, 18, pp. 784 et seq.) A mandamus proceeding should not be used as a substitute for the hearing before the trial court provided by that section.

The facts upon which plaintiff bases its charge of arbitrary action either do not support such charge or are denied by the commissioner and would require a hearing to determine their truth. The facts mainly relied upon follow:

1. It is contended that all of the criticisms and complaints made of petitioner by the commissioner were corrected and his requirements complied with excepting only petitioner's refusal to eliminate completely Mr. Hopps. The record does not support this claim. The petitioner had not agreed to stop the practices which were criticized by the commissioner and in the report. Moreover the commissioner contended that the company was insolvent. The commissioner requested the company to stop writing policies in California until these matters could be straightened out. This the company refused to do.

2. Petitioner sets forth a number of acts of the commissioner, such as his failure to disclose his adjustments to the company's balance sheets, which it contends show as matter of law that he was arbitrary in his actions and was acting for the sole purpose of eliminating Mr. Hopps. Logical reasons for these acts have been given by the commissioner or his attorneys. Whether these reasons are well founded would require the taking of testimony.

3. Petitioner contends the information in the commissioner's possession did not show a hazardous condition of the company's affairs because it claims that:

(a) The brokerage contracts referred to in the report were cancelled. The reports show that some of these were replaced with what it is contended were "worse" contracts. Testimony would be required to determine this question.

(b) The alleged excessive underwriting was substantially reduced. Reference is made to a transcript which is not before us.

(c) The objections in the report to the "alien reinsurance" situation is matter of "pure conjecture." The report shows that this kind of reinsurance was doubled in 1948. Under California law these alien companies do not meet the standards required for reinsurance. See Insurance Code, § 989. That fact alone makes the doubtfulness of their value more than "pure conjecture."

(d) The right of Lloyds to cancel their reinsurance is relatively of no importance, as it probably never would occur. Whether the matters set forth in the report which the auditor considered a change in underwriting giving Lloyds the right to cancel, is such change or not, the report shows that the very existence of the company depends upon the continuance of the Lloyds contract. Perhaps, upon a hearing of all the facts in this case, it might be determined that it is not hazardous, but we cannot say as matter of law that placing so many eggs in one basket is not a hazardous thing for a company to do.

(e) The loss of $1,000,000 on the Pioneer transaction adds nothing to hazardous condition as a separate ground. However, this is an erroneous statement. The entry by an insurance company into a contract which caused it to lose that much money (if it did) might be placing the company in a hazardous condition, whether it did or did not make the company insolvent.

(f) The derivative stockholders' suits should not be considered. These suits are an incident of the commissioner's claims that company funds are being used for the private gains of company officers.

(g) Questionable investments were cured. We are unable to determine that this is so from the record before us. It will require evidence to determine this.

[24] (h) The fact that records of the company do not support certain payments does not show that the payments were improper. The failure to keep proper records is a circumstance to be taken into consideration by the commissioner when considering whether or not the company is in a hazardous condition.

4. Petitioner contends that the commissioner was not justified in considering the company insolvent, because (a) the commissioner admitted that his justification for the claim of insolvency stands or falls on the effect of the Pioneer agreement. We have no such admission before us. The statement of the commissioner quoted in respondents' supplemental memorandum (p. 49) does not justify this conclusion. The statement merely shows that the making of this agreement, when considered with all the other matters, caused the commissioner to feel that immediate action should be taken, not that it was the only fact upon which he based his determination of insolvency.

[25] Petitioner contends that the commissioner's determination of insolvency is open to grave doubt because certain other state commissioners disagree with his conclusion and no state commissioner has taken action similar to this. If the record supports the commissioner in reasonably believing the company to be insolvent under the laws of California, it is immaterial what the commissioners of other states do.

[26] In arriving at the conclusion of insolvency the report takes certain matters into consideration, which petitioner claims were erroneously considered. They are: (1) The Lloyds commission. The commissioner allowed a return to the company of only 25 per cent of Lloyds' commission, when petitioner's 1948 statement assumed 46 per cent. Settlement will not be made until March, 1950, so it is necessary to estimate the amount of the commission based upon as assumed loss ratio. The company assumed a loss ratio of 50 per cent based upon its loss experience of three months under the contract and the company's previous average experience over a 10 year period. The commissioner's auditor took the position that as there had been no real experience under the contract the company should take credit only as of December, 1948, for the commission which the contract guaranteed, namely, 25 per cent. Petitioner's brief states that the company carried $1,300,000 unearned premium reserve on California business when in normal course they expected to pay out in losses only $450,000. This would indicate that the commissioner was not far wrong in anticipating a greater loss in the Lloyds situation than that estimated by the company. We cannot say as a matter of law that in the interests of safe practice and protection to present and prospective California policyholders, the commissioner was wrong in crediting the company only with commissions it was guaranteed, rather than a sum which was highly speculative. (2) The report disallows as assets $379,500 face value notes of Pioneer. These notes are not referred to in any of petitioner's pleadings, but are referred to in its briefs. These notes were unsecured. Petitioner contends that the report shows that Pioneer retained assets more than sufficient to take care of these notes. Assuming these assets to be of the value claimed, we cannot say that as matter of law the auditor was

wrong in not considering a sound investment these unsecured notes of a company that was preparing to go out of business.

Petitioner contends that by admissions in the commissioner's reply to the amicus curiae brief, the commissioner has admitted that $414,808 should be added to the company's assets. This is a wrong construction of the position taken by the commissioner. There is no evidence before us that these alleged assets existed at the time of the seizure nor that the commissioner had knowledge of them.

Petitioner lays emphasis upon the situation as to the receivable shown in the company's statement due from the U. S. Interstate Brokerage Corporation in the sum of $923,761.45, which the auditor questions. (It was not deducted by him in arriving at the figure which shows the company to be insolvent.) Petitioner alleged in its amendment to the petition that as of December 31, 1948, the date to which the audit relates, that sum had actually been reduced to $139,873.89, and that on the date of seizure, it had been reduced to $24,039.19 and that the commissioner knew or should have known on each of these dates the exact situation of that account. In his return to this amendment, the commissioner alleged that he had no notice of the true condition of this account for the reason that petitioner denied the commissioner's examiners full access to the books which would have revealed the true status of this account. The report sets forth at some length the inability of the examiner to get the details of this account due to the action of petitioner's officers and employees. If the facts set forth in the report and as alleged by the commissioner are true, it is obvious that the commissioner did not know the true situation of this account and could not have known it. This issue is one which would require evidence.

In North America Building & Loan Ass'n v. Richardson, supra, 6 Cal.2d 90, 56 P.2d 1221, the building and loan commissioner seized the assets of the company based upon a report made him by a firm of certified public accountants. An attack, somewhat similar to the one in the case at bar, was made upon this report. The appellant endeavored "to destroy the effect of this report by an analysis of the various items of the report in an attempt to prove that if certain items had been considered as assets and certain other items had not been classed as liabilities, the capital impairment would not have been so large." 6 Cal.2d at page 96, 56 P.2d at page 1223. While the impairment there was much greater than in our case, the court held that the audit followed good accounting practice. It found that the report of impairment of assets was a fair one. Here, in spite of petitioner's attack on the report, it appears on its face to be fair and well founded. To prove it otherwise requires a trial. Moreover, the basis for the commissioner's claim of insolvency is not only the report but also the company's own statement of December 31, 1948, and the commitments in the Pioneer agreement.

There are certain allegations in the commissioner's return which support his contention that he was justified in the seizure. Some of these merely demonstrate the background, which it is alleged caused the commissioner to consider petitioner's management subject to question. Thus it is alleged that since 1945 studies have been made of petitioner's financial statements and of examination made by departments of other states, all of which indicated reinsurance dealings by the petitioner, which resulted in great loss to it; that the admission to California of a sister company under common management with petitioner was conditioned on certain agreements to refrain from certain dealings; that this agreement was violated and then in 1948, following certain disclosures by quarterly statements of the petitioner and the other company, the latter agreed to, and did, cease writing insurance in California until its finances were repaired. Then there are allegations which, if true, are quite serious. Thus it is alleged that in 1948, petitioner filed certain quarterly statements with the commissioner, which statements were false; that the examinations of petitioner by Pennsylvania and Indiana examiners as of September 30, 1948, stated that it was not possible to present an accurate statement of the financial condition of petitioner; that petitioner withdrew under compulsion from Minnesota, Connecticut and New York during the years 1947–48; that in two of these states the withdrawal followed complaint from the commissioners of those states of speculative investments by petitioner, of filing unreliable financial statements, of investments by petitioner in companies in which its officers had financial interests. All of these allegations will require evidence to determine their truth or falsity.

Liquidation.

[27] Petitioner has contended throughout that the effect of the seizure of a foreign corporation means almost automatic liquidation and no possibility of rehabilitation. This is not necessarily so. Whether there is conservation and rehabilitation or liquidation depends upon the attitude of petitioner. If it refuses to send into California sufficient moneys to meet claims for losses and returned premiums on cancellation of policies (even under company management there is not kept in this state sufficient funds for these purposes), if it refuses to cooperate with the commissioner in his endeavors to rehabilitate the company, then the commissioner will have to apply to the court for a liquidation order under section 1016. It is the conservator's duty to try to remove the causes leading to the company's difficulties. If this cannot be done, he must attempt to rehabilitate its business, and if this cannot be done, liquidation will have to follow. Carpenter v. Pacific Mutual Life Ins. Co., supra, 10 Cal. 2d 307, 74 P.2d 761.

So far as the effects of seizure are concerned, there is not so much difference between a foreign and a California corporation. The effect of the seizure is practically the same, a bad reputation for the company, cancellation of policies, the loss of its brokers and agents. But the Legislature must have had those results in mind when adopting sections 1011 and 1013. So far as rehabilitation of the company is concerned, it is easier, of course, to rehabilitate a local company because the entire assets are within the state and in the hands of the conservator. However, rehabilitation requires the consent and cooperation of even the local company's stockholders. If they are not forthcoming, the commissioner cannot rehabilitate the company. Perhaps not to the same degree, but to a large extent, the foreign company can be rehabilitated if its stockholders cooperate. This difference in degree is one of the conditions which a foreign corporation must necessarily face as the price of doing business in a state other than its home state.

Assuming, as claimed, that the commissioner will not come into possession of over $145,000 and the normal loss on policies in force is at least $450,000, that there will be a large number of policies cancelled because of the seizure and the unearned premiums will have to be refunded, the commissioner was entitled to feel from the conditions disclosed in the audit that, in spite of such results, the protection of the public as well as of the then policyholders required such action. While this court might have concluded otherwise, were the decision, in the first instance, up to us, still we cannot find, as matter of law, that his action was an abuse of discretion.

[28, 29] Petitioner alleges that the commissioner, although conceding that he has no power to cause the removal of Hopps, the chairman of the board of directors of the company, was actuated in bringing this proceeding because of the failure of petitioner to remove Hopps entirely. Were the financial condition of the company beyond question, and did it not appear that Hopps was, at least, partially responsible for the impairment of the company's assets, this might be important. The commissioner has no power, for personal reasons, to cause the elimination of any individual connected with an insurance company. But, where a course of conduct by that individual has caused serious loss to the company, the commissioner has the right to require that those practices be abandoned. See Caminetti v. Guaranty Union Life Ins. Co., supra, 52 Cal.App.2d 330, 126 P.2d 159. A reasonable conclusion can be drawn from the facts stated in the audit, that petitioner has been dom-

inated by Hopps, and, to some extent, run, for the benefit of himself and other companies in which he was interested, to the detriment of petitioner. Such a fact, if it is a fact, coupled with the other circumstances of the case, would make the commissioner's objection to the practices of Hopps justifiable.

The alternative writ is discharged, and the petition for a peremptory writ is denied.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

I believe that the admitted facts set forth in the record, as a matter of law, show that in seizing the California business and assets of the Rhode Island Insurance Company the commissioner abused his discretion and acted in an arbitrary manner, resulting in practical destruction of the California company and great financial loss to the policyholders.

This petition for a writ of mandate was previously ruled upon by this court. 209 P.2d 72. A rehearing was granted, the petition reargued, and after the filing of additional briefs the matter was resubmitted. On the prior hearing the demurrer was sustained, and based upon that order the alternative writ was discharged and the petition for a peremptory writ denied. On the present hearing all of the original pleadings and certain pleadings filed subsequent to the rehearing have been considered. Included therein is a document which has been referred to as an "audit." This document was prepared under the direction of the California commissioner and filed as an exhibit in the superior court on the application of the commissioner to "take possession" of the California business of the Rhode Island company. This exhibit, which contains the material forming the real basis of the commissioner's action, was considered on the prior and present hearing. However, in addition, the factual matters alleged in certain pleadings, the admissions of counsel and the record generally have been considered.

The real problem presented is whether the insurance commissioner made the application upon technical and trivial grounds to obtain an order as a conservator, which gave him the authority to "seize" the company and to displace the present management, office force and employees. In other words, the question presented is whether the commissioner arbitrarily abused the power of decision vested in him to act under statutory provisions. That the drastic and harsh action of the commissioner will result in the destruction of the California business of the company is admitted. To date the company has complied with every request of the commissioner, but not his demand to displace one of its officials. As I understand the commissioner's theory, it is that a summary seizure may be made though other remedies are available as preventives against any hazardous condition that *may* arise. In the meantime, the commissioner's action directly harms California policyholders of the company and, indirectly, its policyholders throughout the nation. The California policyholders whose policies were thus cancelled are forced to pay two premiums for the same insurance. The commissioner's action indicates a design on his part to avoid a hearing before the destruction of the company has been accomplished. The commissioner seeks to justify his action on the ground that courts in other cases—upon different facts—have upheld seizure without a preliminary hearing.

The issuance of the order of seizure under Insurance Code section 1011, the section under which the commissioner purports to act, is mandatory upon the court, provided certain conditions exist as must appear "upon the filing by the commissioner of the *verified* application". (Italics added.) The "final return" of the commissioner filed in this proceeding on June 8, 1949, alleges that the order of seizure made in the superior court was secured pursuant to the provisions of Insurance Code section 1011 and that it "was based upon the insolvency of said petitioner, upon its hazardous condition, and upon the merger of its business and that of Pioneer Equitable Insurance Company, of Indiana." It is then stated that the alleged insolvency and hazardous condition are based upon a "report" of examination which is set forth as "Exhibit 'A' to said Exhibit 'A' to said petition." It must be admitted that the document is not an "audit" and does not purport to be an audit, but is a "report," and it will be so referred to in this dissent. The report relates certain facts, certain distorted facts, certain information obtained from "hearsay" sources, and the balance consists of statements on "hearsay," statements built upon "hearsay," or conclusions based on surmise.

If an emergency should appear to exist based upon the grounds as enumerated in section 1011 of the Insurance Code so as to require that the commissioner "act immediately," that is, in an emergency, the commissioner may "take possession" of the property of a company without notice and before securing an order of court. § 1013. Without discussing the constitutionality of section 1013, it is apparent that it provides that the commissioner have power to act in an emergency "immediately," without filing a "verified" application setting forth the grounds of seizure. Section 1011 of the Insurance Code provides that upon the filing of a "verified" application showing the existence of certain enumerated conditions the superior court "shall" issue an order vesting title in the commissioner to all assets of the subject company "wheresoever situated." Some of the enumerated grounds for seizure are: (1) refusal to submit its books; (2) that the company "*is found, after an examination*" to be in a hazardous condition; (3) a merger with another company without the consent of the commissioner, and (4) insolvency. (Italics added.) No mention is made in section 1011 with respect to immediate seizure. Section 1013 is an emergency measure; the other, 1011, provides an orderly legal procedure that should insure the protection of the company and the policyholders. Section 1011 is mandatory only after the alleged but verified reasons for seizure are apparent.

A "verified" application is one that is supported by a statement certifying under oath that the allegations in the application are true. People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600; McCaffey Canning Co., Inc. v. Bank of America, 109 Cal.App. 415, 294 P. 45. Ordinarily, a state officer in his official capacity is not required to verify the allegations set forth in an application presented to a court in behalf of the state unless verification *is demanded* by statute. Verification is demanded in section 1011. "A pleading may set forth an instrument or other exhibit *in haec verba*, i. e. verbatim, or attach a copy and incorporate the same by clear and distinct reference thereto in the pleading; it then becomes a part of the complaint. Where, however, the instrument is the foundation of the cause of action or defense, such incorporation does not eliminate the necessity of specific allegations of the material facts, nor do the *recitals* in the instrument take the place of such allegations. [Citing cases.]" (Summary of Calif. Law, Witkin, Code Proc., § VI B. 3, p. 902.) Matters of substance must be set forth in direct terms, not in equivocal recitals. Silvers v. Grossman, 183 Cal. 696, 192 P. 534. Here, the attachment of the report as a base for the allegations is not a mere assertion of its existence but the allegations of the application are founded upon the statements set forth in the "report." Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R. 1338. Such a report must state the truth without equivocation. The only claim of verification which the commissioner could make would be with respect to the affidavit attached to the application, which is made in the usual form verifying as to actual knowledge except as to matters stated upon information and belief. No reference is made to the truth of the "report." It is sometimes permissible to state the existence of certain facts on hearsay evidence if the grounds of the hearsay evidence are given so that the truth of the statement may be determined. (Am.Jur. Vol. 1, p. 951.) The attachment to a pleading in a court proceeding of a copy of a written document as an exhibit is a representation that the document is a genuine and correct copy of the original, but it does not necessarily purport to set forth a narration of the truth. If the pleading is presented under oath an inference may be drawn that portions of the exhibit recite the truth except as to the matters stated therein on information and belief and that the party believes such matters to be true. However, if the document shows the falsity of its own recitals then the exhibit should not be used as the foundation for the issuance of an order of court to seize a business. The following appears in the report and is a sample of one of the methods used to obtain the order of seizure: "Your examiner *questions the admissibility* of a balance in the amount of $923,761.45 due from U. S. Interstate Brokerage Corporation as of September 30, 1948 until the ownership and the location of this agency can be better established. * * * *We have been advised* that the Pioneer Equitable Insurance Company, under the same management contract as Rhode Island Insurance Company, that is, the International Management Corporation, until June 30, 1948, when the Pioneer severed its connection as a member of the Rhode Island Group, *intends* to make claim for the excessive commissions charged on brokerage inasmuch as this contract had never been submitted to its Board of Directors for approval." (Italics added.) Such statements are not made positively, nor is information given indicating a foundation of their truth. See California Trust Co. v. Gustason, 15 Cal.2d 268, 101 P.2d 74. The quoted item of $923,761.45 will be referred to later.

If it be assumed that in preparing the report official duty has been regularly performed (Code Civ.Proc., § 1963, subd. 15) such presumption is controverted by the presentation of this *unverified* report and *its contents.* An official written document should be authenticated by the certification of the legal keeper thereof. (Code Civ. Proc. § 1918.) The "report" in this case is not authenticated. It comprises 201 pages. Only 104 pages appear over the signature of an insurance examiner. The balance of the report contains exhibits and some further information in narrative form. Its contents demonstrate that as a matter of law it could not be used as the basis of a seizure even if it were verified. This conclusion appears certain when the grounds of the seizure are considered, as hereinafter set forth.

The commissioner justified his action of "seizure" upon three grounds: (1) "insolvency"; (2) "hazardous condition," and (3) "merger" with another insurance company. On the prior hearing before this court the commissioner stressed the allegations with respect to a "merger." In the application filed in the superior court it is alleged that Rhode Island "without first obtaining the consent in writing of the said Commissioner, has entered into a transaction the effect of which *is to merge* and consolidate substantially its entire property and business in or with the property and business of another insurance company, to wit: Pioneer Equitable Insurance Company of Indiana." (Italics added.) It appeared that the alleged "insolvency" and "hazardous condition" primarily were based upon the alleged "merger." The report indicates that an agreement was executed to the effect that the petitioner herein, Rhode Island, "reinsures and takes over the entire insurance business of Pioneer Equitable" as shown by "Rhode Island's 1948 annual statement, showing its financial condition" and that the report "has been adjusted to reflect the effect of this reinsurance agreement." The "merger" is not a present consolidation of the two companies, but is merely a reinsurance contract, approved by the Insurance Commissioner of Indiana, upon the deposit of Rhode Island securities of an agreed valuation as a pledge of Rhode Island's faithful and prompt performance of the obligations of payment of possible liabilities. Pioneer Equitable in its independent and nowise consolidated aspect also agreed to make a deposit of certain securities with the Indiana commissioner. Under the terms of the reinsurance contract, not a present but a future discontinuance of business of Pioneer Equitable may occur. "In the event that such steps [the performance of the reinsurance contract] require the dissolution and/or liquidation of Pioneer, Pioneer agrees promptly to take steps to dissolve and/or liquidate." However, the majority opinion holds that "It is unnecessary for us to determine whether the transaction with Pioneer was a merger under this section, or, if so, whether the law can constitutionally require a foreign corporation to obtain consent of the California commissioner. The commissioner is making no claim of the illegality of that transaction. While he refers to it as a 'merger' and we have used the word herein, it is without any legal signification." Irrespective of the contentions of the commissioner, the ground for "seizure" based upon "merger" need not be given lengthy consideration though the financial transaction involved may be pertinent in discussing the questions of "insolvency" or "hazardous condition."

There are many judicial declarations from this and other jurisdictions, made no doubt to fit the facts of each particular case, on the question of the power conferred by statute on public commissions and boards. Each case, however, must stand on the particular facts involved. The facts of the case at hand must be considered separately from the facts of all other cases. Because one seizure of the property and management of a company has been approved by an appellate court does not mean that the language used by the appellate tribunal in that instance is applicable to all similar subsequent "seizures." That the foregoing statement is founded on a reasonable and sound theory may be illustrated with respect to the subject of insolvency. If a bank, building and loan association or insurance company is found destitute of funds caused by the fraudulent methods of the management resulting in legal insolvency, harsh language and strict rules, based on statutory construction, often appear as the reaction to the offended sense of justice of the author of an opinion on the matter. Such language, however, should not be used as an influence or guide in determining problems based upon different facts. Such a practice would lead to a remedy not appropriate to the case. A judicial precedent based upon analogous facts may be an authoritative determination directing a logical conclusion, but when such precedent is applied to facts materially differing it may result in a decision that is not conformable to justice.

The constitutionality of the various sections of the Insurance Code here involved need not be determined. For the purpose of considering this proceeding it may be assumed that they are constitutional. The commissioner relies strongly on North American Building & Loan Association v. Richardson, 6 Cal.2d 90, 56 P.2d 1221. In that case on an appeal taken by the building and loan association against the commissioner, the primary question to be determined was the sufficiency of the evidence to uphold the judgment of the trial court. There an audit prepared by a "firm of certified public accountants" was introduced to prove "a capital impairment" of the association assets. In the present proceeding the question presented is not the sufficiency of the evidence but the sufficiency of the pleadings and whether the unsigned and *unverified "report"* sets forth such inconsistent, contradictory, exaggerated and minimized statements that as a matter of law it should be declared insufficient to base an order of seizure. In this case the alleged "insolvency" and "hazardous condition" are grounded on the "report." The "report" contains alleged data which primarily brought about the seizure. The application made to the superior court for the order of seizure does not purport to claim that the narrations or statistical matter recited in the "report" are in fact true. The "report" itself demonstrates that at least some of the items are untrue, and that others are exaggerated or minimized. In some instances the author of the report resorts to rumor instead of facts. The use of such terms as "We are informed" or "We have been advised," without stating the source of the information or advice, are typical examples of the uncertainty of the information contained in the report. The "report admits the author's inability to understand certain statistical adjustments because, as the report states in substance, no effect was given in the adjusted financial statements due to legal aspects and insufficiency of data.

A suggestion is made that the commissioner was unable to obtain certain statistical data from the Rhode Island company. If that accusation were true, that is, in the sense that the company offered no excuse for refusing to give certain financial data to the commissioner, then all the commissioner needed to do in order to obtain full control of and title to the assets of the company was to file a "verified" application showing that the company had refused to submit its books "to the reasonable inspection of the commissioner * * *." Insurance Code, § 1011. But no such application was made. During part of this period the books were under inspection by representatives of other states. There is no claim that any commissioner seized the property in any other state.

On the question of insolvency, the majority opinion states: "The commissioner concedes that there is an excess of assets over true liabilities, so that no actual insolvency exists." This statement appears to be correct. On the date of the seizure the commissioner obtained only $145,000 in assets. However, available assets might have reached the required amount the day before the seizure. There is no claim made that the home office, upon receipt of a request by wire, for instance, from its San Francisco office, could not have furnished the required amount immediately.

The commissioner contends that there is an overcredit of $616,589.79 on reinsurance commission payable to Rhode Island from "Lloyds." In the petition for rehearing the Rhode Island company states: "The Lloyd's contract provides for a decreasing scale of commissions, based upon Petitioner's loss ratio with a minimum of *25%* as shown in the audit. The Commissioner arbitrarily assumed that only the minimum commission, the 25%, will be earned. In order for Petitioner to receive no more than 25%, it would have to incur an unprecedented ratio of 65%. In the ten-year period from 1938 to 1947 the company's loss ratio has averaged 51.4%. The contract provides that if the loss ratio is 50% the commission is 46%. If the loss ratio is 51.4% the commission is 1.4% less, or 44.6%. It is obvious therefore that the write-off of $616,589.79 on the arbitrary assumption that only a 25% commission will be earned is capricious and arbitrary. On the basis of Petitioner's average loss ratio of 51.4% the Commissioner's figure is arbitrarily excessive by $563,238.79. Therefore over $563,238.79 of the $616,589.79 is on the face of the audit, an unjustified, arbitrary write-off." The majority opinion states: "The right of Lloyds to cancel their reinsurance is relatively of no importance, as it probably never would occur. Whether the matters set forth in the report which the auditor considered a change in underwriting giving Lloyds the right to cancel, is such change or not, the report shows that the very existence of the company depends upon the continuance of the Lloyds contract." The majority opinion then adds: "Perhaps, upon a hearing of all the facts in this case, it might be determined that it is not hazardous, but we cannot say as matter of law that placing so many eggs in one basket is not a hazardous thing for a company to do." It could just as well be said that since 1688, the year Lloyds was founded, the reputation of "Lloyds" for stability has not been questioned. In such a situation it is well that Rhode Island protects its stockholders and policyholders by hatching its eggs in a "Lloyd" basket.

Other reasons for the seizure are given, based upon minor matters, which will be referred to briefly. The "hazardous condition" problem will be referred to later. One of the minor reasons given for the seizure is that three other states—Minnesota, Connecticut and New York—have either directed or suggested that the Rhode Island Insurance Company should cease doing business in the named states. It appears that the commissioners of several other states were interested in auditing the company's books, but the record does not show that any action was taken against the Rhode Island company except in the three states mentioned. In the petition for writ of mandate a verified statement appears over the signature of an official national examiner, as follows: "For more than the past two weeks I have been engaged, together with other examiners, in making a convention examination of the business and affairs of the Rhode Island Insurance Company and for that purpose I am at present in the City of Philadelphia, Pennsylvania, where the records of the company are located. * * * That on May 24, 1949, I sent a straight wire telegram to Honorable J. Edwin Larson, Insurance Commissioner of the State of Florida, Tallahassee, Florida, who is also President of the National Association of Insurance Commissioners of the United States, reading as follows: 'Retel concerning financial condition of Rhode Island Insurance Company. Examiners representing zones one, two, three, four and five are now conducting an examination of the subject company. Zone six had accepted assignment but to date not represented. No evidence of an insolvent condition apparent and current publicity and unrest resulting from California action appears to be unwarranted on the basis of information at hand. * * *'" Another "verified" statement appears therein, as follows: "I am an official examiner in the office of the Insurance Commissioner of the State of Rhode Island. * * * I am in the process of making an examination into the affairs and condition of the Rhode Island Insurance Company and we do not concur with the allegations of the California Insurance Department that the Company is on the verge of insolvency. All the facts set forth in this affidavit are true and correct." In view of the fact that the majority opinion sets forth, as one of the minor reasons for the seizure in California, the action taken in Minnesota, Connecticut and New York, it seems proper to call attention to the fact that the Rhode Island company was licensed in 30-odd states and that no other state has taken the action adopted in the three states mentioned, and that those three states only resorted to the giving of a notice to the company *to cease certain practices. No state except California had adopted the plan of destruction of the company* and consequent injury to its thousands of policyholders in this state. The action of Minnesota is proof in itself that the harsh action taken in California is not justified. In Minnesota the Rhode Island company was notified that the commissioner disagreed with certain practices then being followed and that Rhode Island should discontinue the practices or withdraw from business in that state. The company concluded it was justified in continuing its current policy and preferred to voluntarily withdraw. In California the commissioner made a demand on the company to withdraw from business *and then withdrew the demand.*

The majority opinion fixes a legal rule or test to be applied by the trial court: "Under section 1011 [Insurance Code] nothing is required beyond the good faith determination by the commissioner of the existence of one of the conditions enumerated in the section." Section 1011 does not contain one word about "good faith." There is a decision which used language similar to that of the test set forth in the majority opinion. In Caminetti v. Imperial Mutual Life Insurance Company, 59 Cal. App.2d 476, at page 487, 139 P.2d 681, at page 687, the court stated: "In obtaining his original ex parte order, the commissioner is not required to show to the court that the company was in fact in a hazardous condition, but only that he, as a state officer, invested by legislative authority with the power, has so 'determined' and 'found.'" In that case the court affirmed an order restoring the business to the insurance company.

The rule of "good faith" may be applied to the record and to admissions made by counsel. It is the desire of the commissioner from the commencement of this proceeding to have the company discharge a certain Mr. Hopps. That the commissioner's attitude toward Hopps has not changed is apparent from a remark of the attorney general representing the commissioner at the oral argument, referring to Hopps and his removal: "Well, I think the commissioner felt that that was the seat of the trouble." The following day the position of the commissioner was changed to the extent that a rehabilitation could occur if the company complied with all of the commissioner's directions. In the commissioner's supplemental memorandum of points and authorities, on page 41, the following appears: "He [the commissioner] further insists that any rehabilitation of the company must include riddance of Mr. Hopps." I do not purport to commend or to condemn the activities of Hopps. The point is that the commissioner may direct the change of policies and practices in the operation of an insurance company, so far as California has jurisdiction; but the commissioner may not direct the change of the officers of a company. If the commissioner has the authority to "fire" he likewise has the authority to "hire." This could lead to political dictatorship in insurance matters. The authorities on this subject, that is, where personnel is concerned, are directed to change of "practices" and not the removal of officers. The strange feature of this phase of the case is that the commissioner knows that he does not possess the authority to demand the removal, but still persists in the "riddance" of Hopps. To my mind this shows lack of good faith as a matter of law, and the trial court is not called upon to pass upon the good faith issue as a matter of fact.

The majority opinion admits that the effect of seizure is "bad reputation for the company, cancellation of policies, the loss of its brokers and agents." This effect is destruction and, upon the record in this case, arbitrary action. It demonstrates the lack of good faith on the part of the commissioner.

The commissioner's lack of good faith also is patent from the record on the allegations in reference to an alleged receivable, heretofore referred to, which was due Rhode Island Insurance Company from the U. S. Interstate Brokerage Corporation in the sum of $923,761.45. In an amendment to the petition by the Rhode Island company to this court it is stated and *verified* that "the facts are that as of 12/31/48, said receivable of Petitioner had been reduced to $139,873.89 *and Commissioner knew or should have known this to be the fact;* * * * that on May 17, 1949, the date of seizure by the Commissioner, said receivable had been reduced to $24,039.19, *and Commissioner knew or should have known* as of the said date of said seizure that of this receivable of $923,761.45, the sum of $899,722.26 had already been paid to and received by Petitioner." (Italics added.) The figure set forth in the "report"—$923,761.45, instead of $24,039.19—must have staggered the superior court judge, as it did this writer. The commissioner does not deny the truth of the Rhode Island company's *verified* amendment, but seeks to avoid the matter by claiming inability to obtain the records from the company. To make the erroneous allegation—presented even as a "question"—without foundation or proof is an instance not only of capricious, arbitrary conduct but of lack of good faith.

The *record* in this case demonstrates that the seizure referred to in the majority opinion is the result of the personal and official disapproval by the California commissioner of one of the officers of the Rhode Island Insurance Company rather than fear that the company was or might become insolvent.

I am convinced that on the merits of the demurrer, or upon consideration of all of the pleadings, or upon the good faith test as set forth in the majority opinion, an order should issue setting aside the order of seizure, without prejudice to the commissioner, if there is good cause therefor, and instituting a form of procedure that would not accomplish the certain destruction of the California business of the company and irreparable injury to its agents as well as to more than 140,000 policyholders in California.

Hearing denied; SCHAUER, J., dissenting.

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